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In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ALPERS' JOBBING COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
A. The Board proceedings	3
B. The decision of the court of appeals	7
Reasons for granting the writ	8
Conclusion	16
Appendix A	17
Appendix B	29
Appendix C	31
Appendix D	43

CITATIONS

Cases:

Boire v. *Greyhound Corp.*, 376 P.S. 473	10
Fibre Leather Manufacturing Co., 167 NLRB 393	11
Harlan #4 Coal Co. v. *National Labor Relations, Board*, 490 F. 2d 117	9
Johnson City Foundry and Machine Works, Inc., 71 NLRB 825	9
McFarling Bros. Midstate Poultry & Egg Co., 123 NLRB 1384	6, 9
Marriott In-Flite Services Division v. *National Labor Relations Board*, 417 F. 2d 563, certiorari denied, 397 U.S. 920	11
National Labor Relations Board v. *A. J. Tower Co.*, 329 U.S. 324	8, 10, 11
National Labor Relations Board v. *Gissel Packing Co.*, 395 U.S. 575	10
National Labor Relations Board v. *Mattison Machine Works*, 365 U.S. 123	9
National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U.S. 206	9

238-720—77——1

Cases—Continued	Page
National Labor Relations Board v. *Wyman-Gordon Co.*, 394 U.S. 759	8-9
Semi-Steel Casting Co. v. *National Labor Relations Board*, 160 F. 2d 388, certiorari denied, 332 U.S. 758	9
T & G Mfg. Inc., 173 NLRB 1503	9
V. LaRosa & Sons, Inc., 121 NLRB 671	9
Statute:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)	
Section 8(a)(1)	2
Section 8(a)(5)	2
Section 9	9
Section 9(a)	2
Section 9(c)(1)(A)	3
Miscellaneous:	
Forty-First Annual Report of the National Labor Relations Board (1971)	15
National Labor Relations Board Casehandling Manual, Part Two, Representation Proceedings (1975)	11

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 547 F. 2d 402. The decision and order of the National Labor Relations Board (App. C, *infra*) are reported at 222 NLRB 817. The Regional Director's report on objections and the Board's decision in the related representation proceeding are set forth in App. D, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1976 (App. A, *infra*). The Board's timely petition for rehearing *en banc* was denied by

an evenly divided court on March 15, 1977 (App. B, *infra*). On June 6, 1977, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including July 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether unambiguously marked ballots cast in a representation election properly conducted by the National Labor Relations Board may subsequently be impeached on the ground that a voter may have made a mistake in marking his ballot.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> Section 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees

> in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *
>
> * * * * *
>
> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), * * *
>
> * * * * *
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

A. THE BOARD PROCEEDINGS

In April 1975, pursuant to a representation petition filed by Teamsters Local Union No. 688 (the "Union") under Section 9(c)(1) of the National Labor Relations Act, an election by secret ballot was conducted among the warehouse employees of respondent Alpers' Jobbing Company (the "Company").

The tally of ballots indicated six votes for the Union, three votes against the Union, and three challenged ballots (R. 8).[1] The challenges were made to ballots cast by employees Marshall Dubinsky, Sam Melinas, and Louis Sacus, whom the Union had challenged on the ground that they were not on the March 1 payroll (the ending date for voter eligibility) and were not regular part-time or full-time employees (R. 9). The Regional Director, finding that Dubinsky, Melinas, and Sacus were regular, part-time employees, recommended that the challenges to their ballots be overruled (R. 11). The Board adopted the recommendation and ordered the Director to open and count the challenged ballots (R. 12). The ballots, when opened, disclosed that one of the challenged employees had voted for the Union and two had voted against the Union, making the revised tally seven votes for, and five against, the Union (R. 14).

The Company filed objections to the conduct of the election, alleging that each of the three challenged employees had indicated to Company president Alper, both before and after the election, that he intended to vote against the Union; that Sam Melinas could not read or speak English and read only a little Yiddish; that Louis Sacus is virtually illiterate and cannot read without his glasses, which he had forgotten on the day of the election; that all three employees were upset by the Union observer's loud challenge of

[1] "R" refers to the appendix to the Company's brief in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

Marshall Dubinsky, which Dubinsky interpreted as a challenge to fight; and that this disruption, coupled with the Regional Director's failure to provide an interpreter or print the ballots in Yiddish, apparently resulted in one of the employees erroneously marking his ballot for the Union (R. 15–18). In support of its objections, the Company presented affidavits from Company president Irvin Alper and employee Sharon Sacus, the granddaughter of Louis Sacus, and, later, affidavits from the challenged employees (R. 19–28, 39–44).

After conducting an administrative investigation, the Regional Director recommended that the objections be overruled and that the Union be certified as representative of the Company's employees (R. 45–51; App. D, *infra, p.* 51). The Regional Director found that Company president Alper had posted the Notice of Election on the employees' refrigerator about one week before the election and that during that time he had, on several occasions, explained the sample ballot on the notice to the three employees.[2] He further found that Alper did not inform the Board agent conducting the election that some of the voters might not understand the ballot, nor did he request the Board agent to explain the ballot to employees when they presented themselves to vote. Finally, the Regional Director found that all three employees, in sworn affidavits given to a Board agent, stated that they understood the ballot and knew how to mark it when

[2] The affidavit of Sharon Sacus (R. 32) indicated that she, too, had explained the ballot to the three employees.

they entered the voting booth, and that they did not request the Board agent conducting the election to explain the ballot to them. However, Louis Sacus added that, when the Board agent gave him a ballot, the agent explained how to vote for or against the Union. Sacus also stated that, while he requires glasses to read, he could see a "yes" with three letters and a "no" with two letters without his glasses. (R. 48; App. D, *infra,* pp. 46–49.)

The Regional Director concluded that, in these circumstances, the situation was governed by the general principle enunciated in *McFarling Bros. Midstate Poultry & Egg Co.,* 123 NLRB 1384, 1389, that "the intent shown by the clearly marked ballots cannot be destroyed by subsequent statements of alleged mistakes in the voting, nor by a subsequent petition alleging misunderstanding and that a signed statement submitted as to how an employee voted may not be considered as evidence to rebut the results of a secret ballot election" (R. 49; App. D, *infra,* p. 49). The Regional Director further found that the action of the Union observer in challenging Dubinsky's vote did not create an atmosphere of confusion or fear sufficient to preclude a fair election, for the Board agent had quickly quieted the individuals involved in this incident, whereupon the voter cast his challenged ballot and left (R. 50; App. D, *infra,* pp. 50–51).

The Company filed exceptions to the Regional Director's report with the Board (R. 52–61). The Board sustained the Regional Director's findings and recommendations, and certified the Union as the

representative of the Company's employees (R. 62–64; App. D, *infra,* p. 54). Following certification, the Company refused the Union's request to bargain and a complaint issued on the Union's charge alleging that the Company had violated Section 8(a)(5) and (1) of the Act. The Board, granting the General Counsel's motion for summary judgment, sustained the allegations of the complaint and ordered the Company to bargain with the Union (App. C, *infra,* pp. 40–41).

B. THE DECISION OF THE COURT OF APPEALS

A divided court of appeals denied enforcement of the Board's order (App. A, *infra*). The court concluded that, in the circumstances of this case, the Board "should have given some consideration to the protestations of the employees that they all intended to vote 'no' in the election and that one of them might have made a mistake" (App. A, *infra,* pp. 23–24). The court noted in support of its decision the following factors: (1) the Union's challenge to the three employees suggested that the Union felt their votes would be against its petition; (2) that all three employees went to the Company prior to the election for an explanation of the ballot and of how to cast their votes made it likely that they intended to vote against the Union; (3) Dubinsky and Melinas may have been disconcerted by the Union observer's loud challenge to Dubinsky, and Sacus, who had poor eyesight, left his glasses at home; and (4) that all three employees going to the employer immediately after the election and protesting the challenge to their votes

238-720—77——2

further indicated that their sympathies lay with the employer and against the Union (App. A, *infra,* pp. 22–23).

Judge Webster, in dissent, observed that the court's decision rested on its own determination, based principally on the statements and conduct of the three employees, that one of the employees had made a mistake in voting (App. A, *infra,* p. 27). In his view, the objectives of the Act were best served by refusing to overturn the election results on the basis of such evidence of mistake, since entertaining it would furnish a basis for delaying the resolution of representation questions and expose employees to the threat of coercion from either the employer or the union (App. A, *infra,* pp. 27–28).

The Board's petition for rehearing *en banc* was denied by an evenly divided court (App. B, *infra,* p. 29.).

REASONS FOR GRANTING THE WRIT

The decision below constitutes a serious departure from established principles respecting the Board's authority to fashion rules governing the conduct of representation elections and the limited role of the courts in reviewing such matters. This Court on several occasions has expressly recognized that Congress "entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *National Labor Relations Board* v. *A. J. Tower Co.,* 329 U.S. 324, 330. Accord: *National Labor Relations Board* v. *Wyman-Gordon Co.,* 394 U.S. 759, 767; *National Labor Relations Board* v. *Waterman Steamship Corp.,* 309 U.S. 206, 226. The function of a reviewing court with respect to such matters is confined to guarding against arbitrary or capricious action by the Board. See *National Labor Relations Board* v. *Mattison Machine Works,* 365 U.S. 123; *Harlan #4 Coal Co.* v. *National Labor Relations Board,* 490 F. 2d 117, 120 (C.A. 6); *Semi-Steel Casting Co.* v. *National Labor Relations Board,* 160 F. 2d 388, 391–392 (C.A. 8), certiorari denied, 332 U.S. 758. Although the court below purported to adhere to these principles (App. A, *infra,* pp. 21–22), its refusal to uphold the Board's rule regarding post-election claims of mistake significantly intrudes upon the functions reserved by Congress to the Board and creates serious doubt about the proper administration of the Act in the sensitive area of the conduct of representation elections.

1. In the exercise of its discretion under Section 9 of the Act to determine procedures for conducting representation elections, the Board has adopted the general principle that clearly-marked ballots may not be impeached by post-election statements or other evidence indicating that the voter made a mistake or acted under a misunderstanding.[3] That principle, like the rule barring post-election challenges to voter eligibility, which this Court sustained in *National Labor*

[3] See *McFarling Bros. Midstate Poultry & Egg Co.,* 123 N.L.R.B. 13[illegible]9; *V. LaRosa & Sons, Inc.,* 121 N.L.R.B. 671; *Johnson City [illegible]ndry and Machine Works, Inc.,* 71 N.L.R.B. 825, 827–828. See [illegible] *& G Mfg. Inc.,* 173 N.L.R.B. 1503.

Relations Board v. *A. J. Tower Co., supra,* is not merely a rule of convenience but is necessary to assure employees free choice in the selection or rejection of bargaining representatives.

The Board's policy against post-election impeachment of voter intent recognizes that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support" (*National Labor Relations Board* v. *Gissel Packing Co.,* 395 U.S. 575, 602), and that "any rule that requires a probe of an employee's subjective motivation [involves] an endless and unreliable inquiry" (*id.* at 608). The Board's rule also furthers the congressional intention that representation questions be promptly resolved (see *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 478), for post-election questioning of voter intent "would tempt a losing union or an employer to make undue attacks" on the votes cast "so as to delay * * * the election results." *National Labor Relations Board* v. *A. J. Tower Co., supra,* 329 U.S. at 332.

In addition, the Board believes that a contrary policy would create, as Judge Webster stated in dissent (App. A, *infra,* pp. 27–28), "a very real opportunity to expose the employees to coercion, from either the employer or the union." As Judge Webster noted (*id.* at 28):

> If either party were free to question an employee about his vote simply because he had previously voiced a different sentiment, the employee would be subject to coercion to avoid accusations of betrayal from the side he had appeared to favor. The purpose of the secret ballot is to assure the voter his right to exercise his true choice in secret no matter what he may have felt it necessary to say previously. [Footnote omitted.]

Rather than permit post-election claims of mistake, the Board instead makes every effort to assure conditions in which mistakes in voting are unlikely to occur. For example, recognizing that some employees voting in a Board election may be illiterate or unable to read English, the Board requires that election notices, which contain a sample ballot, be posted at conspicuous places in the plant for at least three working days prior to the election.[4] Employees are thus assured a meaningful opportunity to discuss the election and the ballot among themselves, with union representatives, or, in some cases, with employer representatives; in the course of such discussions, the ballot presumably will be explained even to the employees who are illiterate or cannot read English. Moreover, if the employer or the union anticipate that a group of employees is likely to have difficulty in understanding the ballot, the Board, upon being advised, will arrange for foreign language ballots.[5] And, at the time of the election, the Board agent conducting the election will explain the ballot to any employee requesting assistance.

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[4] See National Labor Relations Board Casehandling Manual, Part Two, Representation Proceedings, Section 11314 (1975).

[5] See *Fibre Leather Manufacturing Co.*, 167 NLRB 393; *Marriott In-Flite Services Division* v. *National Labor Relations Board*, 417 F. 2d 563, 565 (C.A. 5), certiorari denied, 397 U.S. 920.

Against this background, the Board's rule barring post-election questioning of voter intent, while not "an absolute guarantee" against mistake, is "a justifiable and reasonable adjustment of the democratic process." *National Labor Relations Board* v. *A. J. Tower Co., supra,* 329 U.S. at 333. Although an occasional mistake may occur, the Board may properly conclude, as Judge Webster stated (App. A, *infra,* p. 28), that "[i]t is better than an election fairly conducted be allowed to stand regardless of claims of mistake than that employees whose votes were unsuccessfully challenged be made cat's-paws in the election contest."

2. In the present case, nothing in the conditions surrounding the election presented such an intolerable risk of mistake as to require consideration of post-election attacks on the accuracy of the ballots. As shown (*supra,* pp. 5–6), the Regional Director's investigation disclosed that Company president Alper had posted the Notice of Election on the employees' refrigerator about one week before the election and during that time had, on several occasions, explained the sample ballot and the notice to the three employees whose votes were questioned. Alper did not suggest to the agent conducting the election that some of the voters might not understand the ballot, nor did he request the Board agent to explain the ballot to employees when they presented themselves. Furthermore, all three employees, in sworn affidavits given to a Board agent, stated that they understood the ballot and knew how to mark it when they entered the voting

booth. Louis Sacus added that the Board agent explained the ballot on handing it to him, and that he could see "yes" and "no" without his glasses. In these circumstances, the Board properly applied its general rule that the ballots cast in the election were the best indication of the voters' intention.

Although the court of appeals suggested that the circumstances of this case are unusual (App. A, *infra,* p. 25), or even unique (App. A, *infra,* pp. 18, 23), the factors on which the court relied to overturn the Board's determination are not unusual at all. For example, the court chose to credit the post-election affidavits of Sacus, Melinas, and Dubinsky, saying that they intended to vote against the Union, because each had approached the employer for assistance before the election and had protested the vote after the result became known. But an employee, in order to curry favor with, or to avoid reprisal from, the employer or the union, might well indicate that he will vote, or has voted, contrary to his actual secret-ballot vote. Indeed, the liberty to do so is an inevitable consequence of the secret ballot. Nor is the court aided by conjectures from the fact that the Union challenged the three voters. The Union's challenges in this case were based upon legitimate questions concerning the eligibility of the three employees to vote in the election. Although it is unlikely that a union would challenge known union supporters, the most that legitimately can be inferred from the Union's challenges is that it was uncertain about the employees' true position.

Even more notably, the court of appeals hypothesized that a mistake in marking a ballot could have occurred "if perchance the ballot had been handed any of the three voters upside down," because Sacus "left his glasses at home on election day," or because "Dubinsky and Melinas may well have become confused and disconcerted by the loud vocal challenge to Dubinsky" (App. A, *infra,* p. 23).[6] It is precisely this sort of random speculation that the firm rule about post-election claims of mistake is intended to discourage, as such claims may be limited only by the ingenuity of the unsuccessful parties. Moreover, such possibilities in this case, which were suggested in later affidavits obtained by Company counsel from the three employees,[7] are contradicted by the first affidavits that the employees gave the Board agent. In the first affidavits, the employees stated that they understood the ballot and knew how to

[6] Had the ballots on their face contained compelling evidence that a mistake had occurred, a more legitimate ground for challenge might have been present.

[7] In support of the Company's objections to the election, Company counsel first submitted affidavits only from President Alper and Sharon Sacus (R. 19–28). After the Board agent obtained affidavits from these two persons, and also from Melinas, Louis Sacus, and Dubinsky (R. 29–38), Company counsel submitted additional affidavits from the latter (R. 39–44), suggesting, for the first time, that "it may be possible that I did not mark the ballot correctly" (R. 40, 42, 44). Then, after the Board overruled the Company's objections and certified the Union, Company counsel, in the unfair labor practice proceeding, submitted supplemental affidavits by Melinas, Louis Sacus, and Dubinsky (R. 75–80), which speculated further regarding how they could have made a mistake in marking their ballots.

mark it when they entered the voting booth; Sacus stated that he could see "yes" and "no" without his glasses; and, although Melinas and Dubinsky mentioned the misunderstanding occasioned by the Union observer's challenge of Dubinsky, neither indicated that it had caused him to be confused when he cast his ballot (R. 33–38). Moreover, the affidavit submitted by Sharon Sacus to the Board agent (R. 32) acknowledged that the Board agent conducting the election had, in about two minutes, quieted Dubinsky and the Union observer, and that Dubinsky voted and left the polling place. In sum, the factors relied on by the court below afford no justification for disregarding the Board's rule and for impeaching the results revealed by the clearly marked ballots which were cast in secret.

3. In the fiscal year ending June 1976, the Board conducted 8,899 elections. About 25 percent of these elections involved units of 10 or fewer employees; in 5.7 percent, or 511 of the elections, challenges to ballots were raised. *Forty-First Annual Report of the National Labor Relations Board* 231, 250 (1976). If representation questions are to be promptly resolved, as Congress intended (*supra,* p. 10), it is essential that the parties clearly understand the rules under which challenges will be entertained and sustained. Moreover, if the secret ballot election is to retain the integrity which it has heretofore enjoyed, employees who cast their votes in such an election must be protected, insofar as possible, from post-election inquiry into how they voted.

238-720—77——3

The decision of the court below, if permitted to stand, will imperil both of these objectives by encouraging employers and unions, in close elections, to attempt afterwards to persuade one or a few employees that the employees may have made a mistake in the balloting, and, if they are successful, to file affidavits questioning the reliability of the election results. The Board would then be called upon to investigate numerous objections which, even if ultimately found to lack merit, would have needlessly delayed the representation determination. To avoid these undesirable results in the important and sensitive area of representation elections, the decision below should be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1977.

APPENDIX A

In the United States Court of Appeals for the Eighth Circuit

No. 76-1131

ALPERS' JOBBING COMPANY, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review of an Order of the National Labor Relations Board

Submitted November 9, 1976—Filed December 30, 1976

Before BRIGHT and WEBSTER, *Circuit Judges,* and TALBOT SMITH, *Senior District Judge.*[1]

BRIGHT, *Circuit Judge.*

This case comes before the court on the employer's petition to review an order of the National Labor Relations Board directing the employer (Alpers' Jobbing Co. to bargain collectively with the Union (Teamsters Local 688) and the Board's cross-application for enforcement of its order. The issues presented arise out of an underlying consent election, which was

[1] TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

won by the Union. The employer in refusing to bargain contends that a new election must be held because one of a group of three employees who intended to vote against the Union mistakenly marked his ballot in favor of the Union. The unique circumstances surrounding the election indicate that the Board's election procedures may have failed to produce an accurate indication of employee sentiment. Accordingly, we grant the petition for review and deny enforcement of the Board's order.

The election was held on April 4, 1975, on the premises of the employer, Alpers' Jobbing Company. During that election, the Union challenged the votes of three elderly, part-time employees. Sam Melinas, age 69, is unable to read or write English, and has only limited understanding of spoken English, but can read and write in Yiddish, Louis Sacus, age 63, cannot read or write very well and has almost no reading ability without his glasses, which he had left at home on the day of the election. Marshall Dubinsky, age 66, is apparently a somewhat excitable person. He possesses a greater degree of capability with the English language than Melinas and Sacus, but his comprehension of the English language is also limited.

Melinas, Dubinsky, and Sacus each approached Irvin Alper, president of the company, a number of times before the election seeking an explanation of the election ballot and advice on how to vote. Before the election, each of these three expressed a strong desire to vote against the Union. Due to their limited language ability, however, these three men had difficulty understanding and dealing with the ballot to be used in the election. Sharon Sacus, Louis Sacus' granddaughter, who also works at the plant, furnished an affidavit to the Board stating that she had attempted

to explain the election process to her grandfather at least three times during the week preceding the election, and that she also had explained the ballot at least once to Marshall Dubinsky and Sam Melinas. She was not sure "if they really understood it or not after I explained it to them."

When Marshall Dubinsky came to the voting area on election day, the Union representative, Kenney Allen, called out in a loud voice, "I challenge him." Dubinsky's reaction was to put up his fists to defend himself, thinking Allen was challenging him to a fight. Melinas was right behind Dubinsky and heard the exchange. The Union observer began to stand up, as if to defend himself against Dubinsky, but the Board agent quieted the parties, saying "Let's keep it quiet and go in there and vote." Allen also vocally challenged Melinas, who didn't quite understand the challegen. Sacus' vote was also challenged by the Union.

The ballots cast by these three were placed in challenged ballot envelopes, which were then sealed. Immediately after the election, Melinas, Dubinsky, and Sacus expressed their concern to Alper over the challenge to their votes, and their hope was that their votes would be counted against the Union. Sharon Sacus in her post-election affidavit confirmed that each of these three men had expressed their opposition to the Union, and told her that they all had voted against the Union.

In addition to the three challenged votes, the tally on election day showed six votes for the Union, three votes against the Union, and one void ballot, so it became necessary to consider the challenges. The Union's challenge alleged that these three part-time employees were not on the Company's payroll during the payroll period of voter eligibility. The Regional

Director rejected these challenges, noting that although these employees were paid in cash and not by check, they nevertheless served as regular part-time employees and performed the same work as full-time employees.

On the opening and counting of these three ballots, much to the surprise of the employer, who had expected three additional "no" votes, one ballot was marked "yes" (favoring the Union) and two were marked "no" (against the Union). On one of the "no" ballots the "X" mark was placed outside of the small square designated for voting, but within the larger rectangle designating the "no" section of the ballot. The Company challenged the election results, contending that one of these employees undoubtedly made a mistake in marking his ballot for the Union, because of the combined effect of limited understanding of the language and electoral process, and the atmosphere of fear and confusion created by the Union observer's conduct at the polling place.

The Regional Director rejected the company's objections, ruling that (1) the voters' intent as shown by their clearly market ballots cannot be upset by subsequent statement of alleged mistakes in voting, and (2) the conduct of the Union representative in asserting a challenge did not "render impossible the holding of a fair election." Without any further hearing, the Board upheld the Regional Director's report, and ordered the company to bargain collectively with the Union. The company refused to bargain, and the Board's acting general counsel filed an unfair labor practice charge under § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5). The general counsel filed a motion for summary

judgment. The Board granted the motion, and ordered the employer to recognize and bargain with the Union. The Board held that the company's objections to the election in the unfair labor practice proceedings were foreclosed by the Board's decision in the prior representation proceeding, and denied the Company any hearing on its objections to the election. Thus, in reviewing this unfair labor practice charge, we are required to examine the circumstances surrounding the representation election.

In our assessment of the employer's attempt to set aside the election, we are mindful of certain basic rules followed by the Board in election contests: (1) The Board may exercise broad discretion in representation matters.[2] (2) Ballots cast under the safeguards provided by the Board's procedure presumably reflect the true desires of the participating employees.[3] (3) The objecting party must shoulder the burden of presenting specific evidence which *prima facie* warrants setting the election aside,[4] and this burden is a heavy one.[5] (4) That as a general proposition the secrecy of the ballot should not be invaded so as to permit the Board to consider post-

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[2] *Packard Motor Co.* v. *NLRB*, 330 U.S. 485, 491 (1947); *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330–32 (1946); *Macy's Missouri-Kansas Div.* v. *NLRB*, 389 F. 2d 835, 842 (8th Cir. 1968).

[3] *NLRB* v. *Zelrich Co.*, 344 F. 2d 1011, 1015 (5th Cir. 1965); *Rockwell Mfg. Co.* v. *NLRB*, 330 F. 2d 795, 796–97 (7th Cir.), *cert. denied*, 379 U.S. 890 (1964); *General Shoe Corp.*, 77 NLRB 124, 126, 21 LRRM 1337 (1948).

[4] *NLRB* v. *Mattison Machine Works*, 365 U.S. 123, 124 (1961); *NLRB* v. *Skelly Oil Co.*, 473 F. 2d 1079, 1083 (8th Cir. 1973).

[5] *NLRB* v. *White Knight Mfg. Co.*, 474 F. 2d 1064, 1067 (5th Cir. 1973); *NLRB* v. *Griffith Oldsmobile, Inc.*, 455 F. 2d 867, 871 (8th Cir. 1972).

election statements as to how an employee voted or intended to vote.[6]

We also note that the Board's broad discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives, *see* § 9(c) of the Act; *NLRB* v. *A. J. Tower Co.*, 329 U S. at 330, does not preclude "practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud." *NLRB* v. *A. J. Tower Co., supra* at 331. Where the conditions under which an election is conducted are such as to raise doubts that the election result reflects the true and informed choice of all employees, the Board and the courts have not hesitated to set aside the election. *See Fiber Leather Mfg. Corp.*, 167 NLRB 393, 66 LRRM 1056 (1967); *see also Marriott In-Flite Services Division* v. *NLRB,* 417 F. 2d 563 (5th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

We assess the fairness and propriety of the election and the ballots cast by Melinas, Dubinsky, and Sacus in light of the "totality of the circumstances," *LaCrescent Constant Care Center, Inc.* v. *NLRB,* 510 F. 2d 1319, 1324 (8th Cir. 1975); *see also NLRB* v. *Decoto Aircraft, Inc.,* 512 F. 2d 758, 761 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975). Apart and aside from the post-election affidavits submitted by Melinas, Dubinsky, and Sacus, the facts disclosed by the Regional Director's investigation permit a fair inference that all three of these persons intended to vote against the Union, and that one of them made a mistake in marking his ballot. First, the Union's challenge of Melinas, Dubinsky, and Sacus itself sug-

[6] *See NLRB* v. *A. J. Tower Co.*, 329 U.S. 324 (1946); *T & G Mfg., Inc.*, 173 NLRB 1503, 70 LRRM 1038 (1969).

gests that the Union felt their votes would be against its position. Second, Sacus, Melinas, and Dubinsky all came to the employer on one or more occasions prior to the election seeking an explanation of the election ballot and asking how to cast their votes. It is unlikely that these men would have sought advice on how to mark their ballots from the employer had they intended to vote for the Union. The fact that they acted as a group in seeking advice before the election further supports the inference that they all acted with a common purpose to vote against the Union. The secret ballot's usually conclusive indication of employee intent is seriously undermined by the strong evidence that those three elderly men did not adequately comprehend the balloting and election procedure. One voter was unable to place his "X" in the proper square to vote "no". Moreover, if perchance the ballot had been handed any of the three voters upside down, the place to vote "no" would have been on the left side of the ballot rather than on the right, contrary to what these men had been told prior to the election by both the employer and Sharon Sacus. Sacus, who had poor eyesight for reading, left his glasses at home on election day. Dubinsky and Melinas may well have become confused and disconcerted by the loud vocal challenge to Dubinsky. Finally, immediately following the election, these three individuals approached the employer protesting the challenge to their votes, which further indicates that their sympathies lay with the employer and against the Union.

In light of these unique facts, we think the Board and the Regional Director should have given some consideration to the protestations of the employees that they all intended to vote "no" in the election and

that one of them might have made a mistake. These statements were supported by the post-election affidavit of Sharon Sacus submitted by the employer in its objections to the election, which confirmed that both prior to and after the election, all three individuals told Sharon that they intended to vote against the Union.

We are left with the distinct impression from our review of the record that the vote in this election did not represent the true feelings of one of these three voters. The record, read as a whole, demonstrates that in the representation hearing the election should have been set aside and a new election called.

The Board's position is that statements regarding how an employee voted or intended to vote in a Board election may not be used as evidence to overturn the election. The Board cites *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324 (1946), and *T & G Mfg., Inc.*, 173 NLRB 1503, 70 LRRM 1038 (1969). These cases do not precisely support the broad rule advocated by the Board, which would prohibit any consideration of statements by employees or others of how an employee intended or desired to vote in an unusual case such as this one. In *T & G Mfg., Inc.*, the Union and employer attempted by stipulation to withdraw a challenged vote which the parties agreed had been cast for the Union. That ballot, however, had been placed in the general ballot box and was not segregated into a separate envelope for challenged ballots. The Board held that a ballot, so cast in an election, may not be withdrawn. Here, however, there is no attempt to withdraw a vote knowingly and intelligently cast for one position or the other so as to affect the result of the election, but rather a request

that an employee have a chance to correct a mistake and record his true desire in a new election.

In *NLRB* v. *A. J. Tower Co.*, 329 U.S. (1946), the employer sought to challenge a voter included in the eligibility list it had furnished to the Board. The Supreme Court approved the Board's rule forbidding the challenge of a voter after the votes had been cast, holding it to be justified by practical considerations and in accord with the National Labor Relations Act and the principle of majority rule. The court compared the representation election to a political contest in which voter eligibility challenges must be made, at the latest, on election day. The court noted:

> To permit * * * challenges * * * [after the election] would invade the secrecy of the ballot, destroy the finality of the election result, invite unwarranted and dilatory claims by defeated candidates[.] [*Tower Co.* at 331–32 (citing Cooley, Constitutional Limitations, 8th ed. 1927, p. 1416.]

But here the privacy of the votes of Sacus, Dubinsky, and Melinas had already been compromised by the challenge procedures, even though the identity of the actual "yes" voter remained undisclosed.

The disruptive occurrence at the polls, coupled with the likelihood that one of these elderly gentlemen made a mistake in voting, demonstrates that in this unusual case the election procedure did not assure the fair and accurate expression of these three employees' wishes.

We emphasize that our holding is a narrow one. Ordinarily, neither the employer nor the employees may come forward after the election and dispute a vote recorded on a written ballot. However, given the

special circumstances of this case, which reflect an unintended disruption of the voting process, the Board should have given some consideration to the post-election protestations of the electorate that a grievous error had been made, and that an employee who consistently voiced opposition to the Union may have erroneously marked his ballot in favor of the Union.

The Board's election rules, salutory as they may be, should not be applied so rigidly as to produce a result which, upon examination of the whole record, appears to be plainly erroneous.

The petition for review is granted, the cross-application for enforcement is denied.

WEBSTER, *Circuit Judge,* dissenting.

I respectfully dissent.

The laboratory climate which the Board requires for a certification election contemplates a setting in which a reasonable man is free to exercise his choice without fear of reprisal or promise of benefit. *See General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). An election may be set aside if it is materially affected by any party's misrepresentations, use of coercion, or improper promise of economic benefit. *See NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973) (union's promise to waive initiation fees of those signing authorization cards); *Landis Tool Co., Division of Litton Industries*, 460 F. 2d 23 (3d Cir.), *cert. denied*, 409 U.S. 915 (1972) (employer's coercive tactics); *LaCrescent Constant Care Center, Inc.* v. *N.L.R.B.*, 510 F. 2d 1319 (8th Cir. 1975) (union's material misrepresentation).

Additionally, the Board has recognized that if a particular group of employees would have difficulty expressing their intentions by use of a ballot printed in English, assistance in some form must be provided

on request to insure that the election will reflect the employees' true intent. An election will be set aside if this assistance is not provided. *Fibre Leather Mfg. Corp.*, 167 N.L.R.B. 393 (1967). *See also Marriott In-Flite Services Division* v. *N.L.R.B.*, 417 F. 2d 563, 565 (5th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

In setting aside the Board's certification and bargaining orders in the instant case, the Court does not rely on these established principles. It does not point to any aspect of the election process which fell below the "laboratory conditions" standards, or demonstrate that this was a case requiring assistance for certain employees.[7] Instead, the Court relies on its own determination, based principally on the statements and conduct of these three employees, that one of the employees made a mistake in voting. It seems to me that the objectives of the National Labor Relations Act are best served by refusing to allow such evidence of mistake to overturn an election, even if the result is that an occasional mistake which could affect the outcome of an election goes uncorrected.

Quite apart from the dilatory purpose for which assertions of mistake could be used, entertaining such contentions creates a very real opportunity to expose the employees to coercion, from either the employer

[7] The only arguable basis for a challenge to the election under these standards is the Board's failure to provide assistance to these employees, because of their limited ability to understand written English. However, no request to the Board for such assistance was made. Bilingual ballots would not have been helpful, because two of the three were virtually illiterate and none claimed to be able to read a language other than English.

In fact, the employees were coached by the company and by other employees on how to locate and identify the "yes" and "no" portions of the ballot. It is not clear that anything more could have been done.

or the union. If either party were free to question an employee about his vote simply because he had previously voiced a different sentiment, the employee would be subject to coercion to avoid accusations of betrayal from the side he had appeared to favor. The purpose of the secret ballot is to assure the voter his right to exercise his true choice in secret no matter what he may have felt it necessary to say previously.[8]

It is better that an election fairly conducted be allowed to stand regardless of claims of mistake than that employees whose votes were unsuccessfully challenged be made cat's-paws in the election contest. I therefore conclude that the Board did not abuse its discretion in refusing to set aside the election. I would grant the Board's cross-petition for enforcement.

A true copy.

Attest:

Clerk, U.S. Court of Appeals,
Eighth Circuit.

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[8] As a result of the challenges in the instant case, the company and the union knew that two of the three persons challenged had voted in favor of the union and one had voted against it. If one of the three gentlemen did in fact secretly want the union, he could now vote "yes" in a second election only under pain of exposure.

APPENDIX B

In the United States Court of Appeals
for the Eighth Circuit

No. 76-1131—SEPTEMBER TERM, 1976

ALPERS' JOBBING COMPANY, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of Order of the National Labor Relations Board

The Court having considered petition for rehearing en banc filed by counsel for respondent and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied on the basis of an evenly divided vote.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

March 15, 1977.

APPENDIX C

United States of America, Before the National Labor Relations Board

Case 14–CA–8803

[222 NLRB No. 112, FJP, D–799, St. Louis, Mo.]

ALPERS' JOBBING COMPANY, INC. AND TEAMSTERS, LOCAL UNION NO. 688, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

Upon a charge filed on September 19, 1975, by Teamsters, Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Alpers' Jobbing Company, Inc., herein called the Respondent, the Acting General Counsel of the National Labor Relations Board, herein called the General Counsel, by the Regional Director for Region 14, issued a complaint on September 29, 1975, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (5) and (1) and Section 2 (6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 4, 1975, following a Board election in Case 14–RC–7875, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about August 27, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 14, 1975, Respondent filed its answer to the complaint, with attached supplemental affidavits, admitting in part, and denying in part, the allegations in the complaint. Subsequently, Respondent filed an amended answer.

On November 10, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and a brief in support thereof with appendices attached. Subsequently, on November 18, 1975, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the

[1] Official notice is taken of the record in the representation proceedings, Case 14–RC–7875, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F. 2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F. 2d (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F. Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F. 2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer and amended answer to the complaint and response to the Notice To Show Cause, Respondent admits the request and refusal to bargain but in substance attacks the Union's certification on the basis of its election objections in the underlying representation case. Respondent further contends that the failure of the Board to grant a hearing on its objections deprived Respondent of due process and that it is entitled to a hearing on these issues. The General Counsel in his Motion for Summary Judgment and brief asserts that Respondent is attempting in this proceeding to relitigate matters decided in the prior representation case and this it may not do. We agree.

The record, including that in the representation Case 14—RC—7875, establishes that pursuant to a Stipulation for Certification Upon Consent Election an election was held on April 4, 1975. The revised tally of ballots issued May 16, 1975, showed 7 votes cast for the Union, 5 against, and 1 void ballot.[2] On May 19, 1975, Respondent filed objections to the elec-

[2] The tally issued after the election showed 6 votes for the Union, 3 against, 1 void, and 3 challenged ballots. Following an investigation, the Regional Director issued his Report on Challenged Ballots and Recommendations recommending that the challenges be overruled and the ballots be opened and counted. No exceptions to the Regional Director's report having been filed, the Board on May 5, 1975, adopted the Regional Director's recommendations, overruled the challenges directed that the ballots be opened and counted and a revised tally be served on the parties.

tion relating to the three challenged ballots, contending in substance that the absence of assistance for two voters, one illiterate, one both illiterate and non-English speaking, the failure to have a bilingual ballot (English and Yiddish), and the conduct of the union observer in challenging the three ballots precluded a fair and impartial election. After investigation, the Regional Director on June 9, 1975, issued his Report on Objections and Recommendations in which he recommended that Respondent's objections be overruled and that the Union be certified. Respondent filed exceptions to the Regional Director's report. On August 4, 1975, the Board, having considered the Regional Director's report, Respondent's exceptions thereto, and the entire record, adopted the findings, conclusions, and recommendations of the Regional Director and certified the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue

[3] See *Pittsburg Plate Glass Co.*, v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

which is properly litigable in this unfair labor practice proceeding.

In this proceeding Respondent contends for the first time that due process entitled it to a hearing on its objections to the election. Prior to adopting the findings, conclusions, and recommendations of the Regional Director's Report on Objections and Recommendations, the Board considered the report, the Respondent's exceptions thereto, and the entire record in this case. By its adoption of the report recommending that Respondent's objections be overruled, the Board necessarily found that the objections raised no substantial or material issues warranting a hearing.[4] Further, it is well established that the parties do not have an absolute right to a hearing on objections to an election. It is only when the moving party presents a *prima facie* showing of substantial and material issues which would warrant setting aside the election that he is entitled to an evidentiary hearing. It is clear that, absent arbitrary action, this qualified right to a hearing satisfies the constitutional requirements of due process.[5] We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. THE BUSINESS OF THE RESPONDENT

Respondent is a Missouri corporation engaged in the warehousing and nonretail sale and distribution

[4] *Madisonville Concrete Co., A Division of Corum & Edwards, Inc.*, 220 NLRB No. 100 (1975); *Evansville Auto Parts, Inc.*, 217 NLRB No. 101 (1975).

[5] *GTE Lenkurt, Incorporated*, 218 NLRB No. 139 (1975), *Heavenly Valley Ski Area, a California Corporation and Heavenly Valley, a Partnership*, 215 NLRB No. 129 (1974).

of shoes and related products at its 1419 Martin Luther King Drive and 1201 Cass Avenue facilities in St. Louis, Missouri. During the year ending December 31, 1974, a representative period, Respondent in the course and conduct of its business operations, manufactured, sold, and distributed at its St. Louis, Missouri, place of business, products valued in excess of $50,000 of which products in excess of $50,000 were shipped from said place of business to points located outside of the State of Missouri.

We find, on the basis of the foregoing, that Respondent is, and has been at times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters, Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The representation proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All warehouse employees employed at the Respondent's St. Louis, Missouri, facilities, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On April 4, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 14, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on August 4, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The request to bargain and respondent's refusal

Commencing on or about August 7, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 27, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since August 27, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its opera-

tions described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.,* 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel,* 140 NLRB 226, 229 (1962), enfd. 328 F. 2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company,* 149 NLRB 1419, 1421 (1964), enfd. 350 F. 2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and entire record, makes the following:

Conclusions of Law

1. Alpers' Jobbing Company, Inc., is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Teamsters, Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehouse employees employed at the Respondent's St. Louis, Missouri, facilities, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 4, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 27, 1975, and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent Alpers' Jobbing Company, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Teamsters, Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All warehouse employees employed at the Respondent's St. Louis, Missouri, facilities, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its St. Louis, Missouri, facilities, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., February 9, 1976.

JOHN H. FANNING, *Member.*
HOWARD JENKINS, JR., *Member.*
JOHN A. PENELLO, *Member.*

[SEAL]

NATIONAL LABOR RELATIONS BOARD.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX D

United States of America, Before the National Labor Relations Board, Region 14

Case No. 14–RC–7875

ALPERS' JOBBING COMPANY, INC., EMPLOYER AND TEAMSTERS, LOCAL UNION NO. 688, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

REGIONAL DIRECTOR'S REPORT ON OBJECTIONS AND RECOMMENDATIONS

Pursuant to a petition filed on February 25, 1975,[1] and a Stipulation for Certification Upon Consent Election approved by the Regional Director on March 11, an election was conducted on April 4, in the following appropriate collective-bargaining unit:

> All warehouse employees employed at the Employer's St. Louis, Missouri, facilities, EXCLUDING all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The tally of ballots served at the conclusion of the election discloses the following results:

Approximate number of eligible voters	15
Void ballots	1
Votes cast for Petitioner	6
Votes cast against participating labor organization	3
Valid votes counted	9
Challenged ballots	3
Valid votes counted plus challenged ballots	12

Challenges are sufficient to affect the results of the election.

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[1] All dates herein are in the year 1975 unless otherwise specified.

Challenges are sufficient to affect the results of the election.

Thereafter, the Regional Director caused a full and complete investigation to be made of the challenged ballots and on April 17, issued a Regional Director's Report on Challenged Ballots and Recommendations. Thereafter, the Board, on May 5, adopted such recommendations and issued an Order Directing the Regional Director to open and count challenged ballots cast by Marshall Dubinsky, Sam Melinas and Louis Sacus. Pursuant to such Order, on May 16, the three overruled challenged ballots were opened and counted. A revised tally of ballots served on the parties on May 16, discloses the following results:

Approximate number of eligible voters	15
Void ballots	1
Votes cast for Petitioner	7
Votes cast against participating labor organization	5
Valid votes counted	12
Undetermined challenged ballots	0
Valid votes counted plus challenged ballots	12
Sustained challenges (voters ineligible)	0

A majority of the valid votes counted plus challenged ballots as shown in the final tally column has been cast for the Petitioner.

Objections to conduct of the election were filed by the Employer on May 19.[2]

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Regional Director has caused a full and complete investigation to be made of the objections. By letter dated May 20, the Board agent assigned to investigate the objections

[2] A copy of the Objections is attached hereto and marked as Exhibit 1. Notwithstanding that the objections were not filed within 5 days of the conduct of the election, they have been considered inasmuch as they relate to "essential conditions" of the election. *Edward J. Schlachter Meat Co., Inc.*, 100 NLRB 1171; *Active Sportswear Co., Inc.*, 104 NLRB 1057; *New York Telephone Co.*, 109 NLRB 788.

requested that the Employer furnish the names and addresses of all witnesses expected to give testimony in support of the objections, a brief description of such expected testimony, and all documentary evidence in support of the objections. Pursuant to such request, the Employer on May 27, submitted the names and addresses of witnesses expected to give testimony in support of the objections and a brief description of such testimony considered to be relevant to the objections. All evidence adduced during the investigation, including sworn statements from witnesses, documentary evidence submitted, and the parties' respective statements of position have been fully and carefully considered by the undersigned, who reports thereon and recommends as follows:

BACKGROUND

The Employer is a Missouri corporation with facilities located at 1419 Martin Luther King Drive, and 1511 Hadley in St. Louis, Missouri, and is engaged in the warehousing and nonretail sale and distribution of shoes. At the time of the representation election, there were approximately 15 employees in the above-described unit.

THE OBJECTIONS

The Employer filed seven numbered objections. The objections each relate to the intent of the voters whose challenged ballots were opened and counted pursuant to the Order of the Board. The revised tally of ballots discloses that of the three challenged ballot, one was marked "Yes" and two were marked "No." The three ballots were marked as follows: the "Yes" ballot had

an X within the small square directly under the "Yes"; one "No" ballot had an X within the small square directly under the "No", and the other "No" ballot had an X to the left and outside of the small square, but within the larger rectangle designating the "No" section of the ballot. Neither party to the proceeding objected to any ballot at the time of the counting of the ballots. The Employer's contention is that because of circumstances discussed hereinbelow, the ballot marked "Yes" does not reflect the true intentions of the voter who had cast a challenged ballot in the election. In substance, the Employer's objections are two-fold and will be considered herein as Objection 1 and Objection 2.

Objection 1

In Objection 1, the Employer contends that because two of the three employees are illiterate in English the election should have been conducted in part by use of a Yiddish language ballot or with an interpreter and that as a result of such failure, the "yes" vote of one of the counted challenged ballots does not express the intention of the voter who cast that ballot, inasmuch as all three challenged voters expressed their intent and desire to vote no in the election. The Petitioner, in its statement of position, contends that this objection is without merit and should be overruled.

The Employer presented several witnesses who gave testimony with respect to the extent the voters in question understood the ballot and the voting procedure. In addition, the Employer presented sworn statements taken from the three challenged voters wherein each states "I was very nervous and upset at the time I voted. * * * it may be possible that I did not mark the ballot correctly, but I fully intended

and attempted to vote against the union." Specifically, each of the three voters in question state in sworn affidavits that approximately 1 week before the election they first observed the Notice of Election which was posted on the employee's refrigerator at the Employer's 1419 Martin Luther King Drive, facility and that this notice remained posted until after the election. Two of the voters in question state that they recall the Employer's President Alper explaining the ballot to them, informing them that a "Yes" vote meant that they wanted a union; that a "No" vote meant they did not want a union; that "Yes" was on the left side of the ballot and "No" was on the right side of the ballot; and that the word "Yes" contained three letters while the word "No" contained two letters. In addition, these same two employees recall that during the week prior to the election other employees explained the ballot to them. The third employee in question states in a sworn statement that he does not recall discussing the ballot with President Alper, but that he could read and understand the ballot without explanation and that he explained the ballot to one of the two above-mentioned employees immediately before the election. All three of the employees in question state that they did not request the Board agent conducting the election to explain the ballot to them, but one of the three employees states that when the Board agent gave him a ballot the agent said, "If you want the Union put a mark in this box," pointing to the "Yes" box, "and if you don't want the Union put a mark in this box", pointing to the "No" box. This employee who received the above-described instructions from the Board agent, and who requires glasses to read, states that he could see a yes with three letters and a no with two letters without his

glasses. All three of the above-mentioned employees state that they understood the ballot and knew how to mark it when they entered the voting booth.

The investigation established that neither party to the election brought to the attention of the Regional Office that either the Notice of Election or the ballots should be printed in English and Yiddish, nor that voters would require any special instructions on how to mark their ballots.

Employer's President Alper, in his sworn statement, states that he posted the Notice of Election on the employee's refrigerator approximately 1 week prior to the election and that during that time, and on a daily basis, he explained the sample ballot contained on the notice to the three employees in question. President Alper further states that he did not inform the Board agent conducting the election that some of the voters might not understand the ballot, nor did he request the Board agent to explain the ballot to employees when they presented themselves to vote.

In these circumstances, the undersigned concludes that substantial efforts were made prior to the election to ensure that the employees in question were sufficiently knowledgeable of the voting procedure and understood the ballot, notwithstanding any limited comprehension on their part of the written and spoken word. Thus, the investigation disclosed that the Notice of Election was posted in timely fashion and in a conspicuous place where it was observed by eligible voters; that the Employer explained the ballot to employees prior to the election; that there was discussion among employees as to the meaning of the ballot; that no issue was raised by the Employer prior to the election as to the possibility that employees might not

understand the ballot; and that no voter requested information or instructions during the election although the Board agent did explain the ballot to one of the employees in question when he appeared at the polls. *Craft Manufacturing Co.* 122 NLRB 341; *Palm Container Corp.*, 117 NLRB 434. Further, no objection was raised as to the Board agent's interpretation of the ballots in question at the time of the revised tally. In such circumstances the Board has held that the intent shown by the clearly marked ballots cannot be destroyed by subsequent statements of alleged mistakes in voting, nor by a subsequent petition alleging misunderstanding and that a signed statement submitted as to how an employee voted may not be considered as evidence to rebut the results of a secret ballot election. *McFarling Bros. Midstate Poultry & Egg Co.*, 123 NLRB 1384, 1389.

Accordingly, the undersigned recommends that objection 1 be overuled.

Objection 2

In Objection 2, the Employer contends that the conduct of the Union's observer in challenging the ballots of the three above-named employees "confused and upset" the voters and that the election should be set aside on that basis. The Petitioner contends that this objection is without merit and should be overruled.

In support of this objection the Employer presented several witnesses who testified as to the conduct of the Union's observer during the election. Namely, the Employer presented one witness who states in a sworn statement that when this witness appeared at the polls to vote, the Union's observer yelled out "I challenged him." The witness' reaction to such a statement was to put up his fists to defend himself,

as he thought the Union's observer was challenging him to a fight. The witness further states that upon the employee's putting up his fists, the Union's observer began to stand up, whereupon the Board agent conducting the election stated "Let's keep it quiet and just go in there and vote." The Board agent handed the voter a ballot which the voter took into the voting booth; the voter thereafter came out of the booth and placed his ballot in a challenge envelope which he put in the ballot box. The voter then left the voting area. The second challenged voter states in his sworn statement that when he appeared at the polls to vote, the Board agent gave him a ballot which was explained to him by the Board agent and that he was told to put his ballot in an envelope and deposit the envelope containing his ballot into the ballot box which he did, and then left the polling place. The third challenged voter states in his affidavit that when he arrived at the polls the Union's observer was talking about challenging his ballot but does not remember or understand what was said. This third witness further states that he cast his challenged ballot and left the polling place without further discussion or incident. Another employee witness presented by the Employer states in a sworn affidavit that she was approximately 40 feet from the polling place when she heard the Union's observer shout that he was challenging the voter discussed above who then put up his fists. This witness further states that when the prospective voter put up his fists the Board agent conducting the election said, "Stop it," and quieted the individuals involved in the incident, whereupon the voter cast his challenged ballot and left, the whole incident lasting no more than 2 minutes.

In these circumstances, the undersigned concludes that the conduct attributed to the Union's observer by the witnesses put forth by the Employer does not provide a basis upon which the election should be set aside, inasmuch as this alleged conduct if in fact it did occur did not create such a general atmosphere of confusion or fear of reprisal as to render impossible the holding of a fair election. *Miami Paper Board Mills, Inc.*, 115 NLRB 1431; *McFarling Bros. Mid State Poultry & Egg Co., supra.*

Accordingly, the undersigned recommends that Objection 2 be overruled.

CONCLUSIONS AND RECOMMENDATIONS

Having recommended that the Employer's objections be overruled, and the investigation having failed to disclose evidence of other conduct which would provide a basis upon which the election may be set aside, it is further recommended that a certification of representative issue designating the Petitioner as the exclusive collective-bargaining representative of the employees in the collective-bargaining unit involved herein.[3]

Signed at Saint Louis, Missouri, this ninth day of June 1975.

(S) Joseph H. Solien

JOSEPH H. SOLIEN,

Regional Director,

National Labor Relations Board, Region 14,

Room 448, 210 North 12th Blvd.,

St. Louis. Missouri 63101.

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[3] Under the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, exceptions to this report may be filed with the Board in Washington, D.C. by June 23, 1975.

United States of America, Before the National Labor Relations Board

Case 14–RC–7875 [FJP, St. Louis, Mo.]

ALPERS' JOBBING COMPANY, INC., EMPLOYER, AND TEAMSTERS, LOCAL UNION NO. 688, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulation for Certification Upon Consent Election, a secret-ballot election was conducted on April 4, 1975, under the direction and supervision of the Regional Director for Region 14 among the employees in the stipulated unit described below. On May 16, 1975, the Regional Director served upon the parties a revised tally of ballots [1] which showed that of approximately 15 eligible voters, 12 cast valid ballots, of which 7 were for, and 5 were against, the Petitioner, with no challenged ballots remaining. Thereafter, the Employer filed timely objections.

In accordance with the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the Regional Director

[1] At the conclusion of the election the tally of ballots served upon the parties showed that of approximately 15 eligible voters, 12 cast valid ballots, 6 for, and 3 against, Petitioner, and 3 were challenged. The challenged ballots were sufficient in number to affect the results of the election. After conducting an investigation, the Regional Director on April 17, 1975 issued a Report on Challenged Ballots and Recommendations. On May 5, 1975, the Board adopted his recommendations and ordered that the Regional Director open and count the challenged ballots and issue a revised tally of ballots.

conducted an investigation and on June 9, 1975, issued and duly served on the parties his Report on Objections recommending that the objections be overruled and that Petitioner be certified as the exclusive bargaining representative in the stipulated unit. Thereafter, the Employer filed timely exceptions to the Regional Director's Report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in connection with this proceeding to a three-member panel.

Upon the entire record in this case the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2 (6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All warehouse employees employed at the Employer's St. Louis, Missouri, facilities, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

5. The Board has considered the Regional Director's Report on Objections and Recommendations and the Employer's exceptions thereto and the entire record

in this case and hereby adopts the Regional Director's findings, conclusions and recommendations.

As the Petitioner has received a majority of the valid ballots cast, we shall certify it as the exclusive bargaining representative of the employees in the unit found appropriate.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots has been cast for Teamsters, Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and that, pursuant to Section 9(a) of the Act, the said labor organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment.

Dated, Washington, D.C., August 4, 1975.

JOHN H. FANNING, *Member.*

HOWARD JENKINS, JR., *Member.*

JOHN A. PENELLO, *Member.*

(SEAL) NATIONAL LABOR RELATIONS BOARD.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-70

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ALPERS' JOBBING COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
Jurisdiction	1
Question Presented	7
Statement	7
A. Proceedings Below	7
1. The Election Proceeding	7
2. The Unfair Labor Practice Proceeding	9
B. Circumstances of the Election	11
Reasons for Denying the Writ	15
1. This Court Lacks Jurisdiction	15
2. The "Question Presented" by the Petition Is Not Presented by This Record	15
3. Petitioner Is Asking This Court to Review the Evidence and Find the Facts, on Review of a Summary Judgment	18
4. The Case Depends on Its Unique Facts, and Presents No Important Question of Federal Law Which Needs to Be Settled by This Court	20
Conclusion	25
Appendix 1: Letter dated February 2, 1977 from Clerk, U.S. Ct. of Appeals for Eighth Circuit, to counsel for National Labor Relations Board	A-1
Appendix 2: Order of U.S. Ct. of Appeals for Eighth Circuit, dated February 18, 1977, directing Clerk to file untimely petition for rehearing	A-3

CITATIONS

Cases:

Allegrucci v. United States, 372 U.S. 954 (1963) 4

Alson Mfg. Aerospace Div. of Alson Industries, Inc. v. N.L.R.B., 523 F. 2d 470, 472 (9th Cir. 1975) 20

Argus Optics v. N.L.R.B., 515 F. 2d 939 (6th Cir. 1975) 20

Bowman v. Loperena, 311 U.S. 262, 266 (1940) 6

Conboy v. First National Bank of Jersey City, 203 U.S. 141, 145 (1906) 7

Department of Banking v. Pink, 317 U.S. 264, 268 (1942) 2, 6

Excelsior Laundry v. N.L.R.B., 409 F. 2d 70, 72 (10th Cir. 1968) 20

Fibre Leather Mfg. Corp., 167 N.L.R.B. 393 (1967) 21, 22, 23

FPC v. Idaho Power Co., 344 U.S. 17, 20-21, and note 1 (1952) 6

FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 211-212 (1952) 4

General Shoe Corp, 77 N.L.R.B. 124, 126-127 (1948) 16

Henderson Trumbull Supply Corp. v. N.L.R.B., 501 F. 2d 1224, 1230 (2d Cir., 1974) 20

Isenberg v. Sherman, 286 U.S. 547 (1932) 4

Johnson City Foundry & Machine Works, Inc., 71 N.L.R.B. 825 (1946) 22

LaCrescent Constant Care Center, Inc. v. N.L.R.B., 510 F. 2d 1319, 1324 (8th Cir. 1975) 16

Marriott In-Flite Services Division of Marriott Corp. v. N.L.R.B., 417 F. 2d 563 (5th Cir. 1969), cert. denied, 397 U.S. 920 (1970) 21, 22, 23

McFarling Bros. Mid-State Poultry & Egg Co., 123 N.L.R.B. 1384 (1959) 22, 24

Morgan v. United States, 304 U.S. 1, 14-15 (1938) .. 19

Necco Sales Corp., 119 N.L.R.B. 155 (1957) 23

N.L.R.B. v. Bata Shoe Co., 377 F. 2d 821 (4th Cir. 1967), cert. denied, 389 U.S. 917 19

N.L.R.B. v. Decoto Aircraft, Inc., 512 F. 2d 758 (9th Cir. 1975), cert. denied, 423 U.S. 836 16

N.L.R.B. v. Griffith Oldsmobile, Inc., 455 F. 2d 867 (8th Cir. 1972) 23

N.L.R.B. v. Janler Plastic Mold Corp., 82 LRRM 2174, 2176-77 (7th Cir. 1972) 16, 20

N.L.R.B. v. Mr. Fine, Inc., 516 F. 2d 60, 63 (5th Cir. 1975) 20

N.L.R.B. v. Payless Cashway Lumber Store, 508 F.2d 24 (8th Cir. 1974) 16

N.L.R.B. v. Savair Mfg. Co., 414 U.S. 270, 276 (1973) 15

N.L.R.B. v. Smith Industries, Inc., 403 F. 2d 889, 893 (5th Cir. 1968) 20

N.L.R.B. v. Southern Paper Box Co., 473 F. 2d 208, 211 (8th Cir. 1973) 20

N.L.R.B. v. Staiman Bros., 466 F. 2d 564, 567 (3d Cir. 1972) 19, 20

N.L.R.B. v. Titche-Goettinger Co., 433 F. 2d 1045, 1048 (5th Cir. 1970) 23

N.L.R.B. v. Tower Co., 329 U.S 324, 330 (1946) .. 15

N.L.R.B. v. White Knight Mfg. Co., 474 F. 2d 1064, 1068 (5th Cir. 1973) 24

Palm Container Corp., 117 N.L.R.B. 434, 436 (1957) 24

Papanikolaou v. Atlantic Freighters, Ltd., 232 F. 2d 663, 666-668 (4th Cir., 1956), cert. denied, 352 U.S. 828 6

Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 150 (1942) 4, 5, 6

T & G Manufacturing, Inc., 173 N.L.R.B. 1503, 1504 (1969) 22

Teamsters Local Union 679, etc. v. N.L.R.B., 532 F.2d 1385 (D.C. Cir. 1976) 17

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923) 2

V. LaRosa & Sons, Inc., 121 N.L.R.B. 671 (1958) .. 22

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131, 138 (1937) 6

Other Authorities:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

29 U.S.C. §§ 151 *et seq.* 9, 10

Rule 40(a), Federal Rules of Appellate Procedure 3, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-70

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ALPERS' JOBBING COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

Petitioner seeks to invoke this Court's certiorari jurisdiction under 28 U.S.C. 1254(1). However, this Court lacks jurisdiction, because the petition for certiorari was not filed within ninety (90) days after the entry of the judgment, or even within the maximum 150-day period which may be authorized for good cause under 28 U.S.C. 2101(c).

The petition correctly states (p. 1) that the judgment of the court of appeals was entered on December 30, 1976. Accord-

ingly, the time to file a petition for certiorari expired on March 30, 1977; since the petition was not filed until July 12, approximately 3½ months later, it was filed out of time, and "must . . . be denied for want of jurisdiction." *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). See *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923).

It is true, as the petition implies (p. 1), that a timely petition for rehearing, filed in the court below, would have suspended the running of the 90-day period. However, contrary to the assertion in the petition (p. 1), no *timely* petition for rehearing was filed.

The relevant chronology of events is as follows:

1976

12/30 Judgment entered.

1977

1/13 Time for filing petition for rehearing expired.

1/14 Time for filing petition for rehearing purportedly extended to January 27.

1/27 Time for filing petition for rehearing (pursuant to purported extension of January 14) expired.

1/31 Petition for rehearing received by clerk of court of appeals for the sixth circuit, who forwarded it to clerk of court below (App. 1, p. A-1, *infra*).[1]

[1] Matters set forth in the appendix to this brief in opposition are cited herein as "App. . . ."; matters set forth in the appendix to the petition for certiorari are cited as "Pet. App. . . ."; matters set forth in the appendix to petitioner's brief in the United States Court of Appeals for the Eighth Circuit (which apparently has been filed with this Court) will be cited as "R. . . .", following the form used in the petition for certiorari.

2/2 Petition for rehearing received by clerk of court below; clerk "decline[s] to file the untimely petition for rehearing" (App. 1, p. A1, *infra*).

2/18 Order of court of appeals "that the Clerk of this Court is directed to file the untimely petition for rehearing" (App. 2, p. A3, *infra*).

3/15 Petition for rehearing en banc, also considered as a petition for rehearing, denied (Pet. App. 29).

3/30 Time for filing a petition for a writ of certiorari expired.

6/6 Order signed by Mr. Justice Blackmun, purportedly extending time to file petition for writ of certiorari to July 13.

7/12 Petition for writ of certiorari filed.

It is apparent from the above chronology that the petition for rehearing was not timely filed. It was not lodged with the clerk of the court below until February 2, six days after expiration of the (previously extended) time for filing a petition for rehearing,[2] and was not even lodged with the clerk of the wrong (Sixth Circuit) court until January 31, four days late. It was not in fact filed until the court below ordered the clerk to file it on February 18, 21 days after expiration of the allowed time. In a motion for leave to file the petition for rehearing, petitioner requested leave to file the petition "out of time." The court's order of February 18, directing that it be filed, described the petition as an "untimely petition" (App. 2, p. A3, *infra*). The petition cannot properly be described as a "timely petition for rehearing."

[2] It would appear that the purported extension of time to January 27, ordered on January 14, was a nullity, because the time to file had previously expired on January 13. FRAP 40(a). However, because the petition was not filed within the time as purportedly extended, that point need not be developed here.

Any suggestion that this petition for certiorari is nevertheless timely, on the theory that the running of the 90-day period was suspended by the filing of the untimely petition for rehearing below, would be devoid of merit.

> "[W]here out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts—if any are offered—support grounds for opening the original order and determines that no grounds for a re-examination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order." *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 150 (1942).

Cf. FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 211-212 (1952); *Isenberg v. Sherman*, 286 U.S. 547 (1932) (untimely petition to recall remittitur, argued, briefed and denied, did not extend time for petition for certiorari).

The order of February 18, directing the clerk of the court of appeals to file the untimely petition for rehearing, does not suspend the running of the 90-day period for certiorari. *Cf. Allegrucci v. United States*, 372 U.S. 954 (1963) (time for certiorari not suspended by entertaining of untimely petition for rehearing and denial "after due consideration"). If the petition for rehearing is not timely, the running of the statutory period will be suspended only if the court in fact re-examines the basis of the original order. See *Pfister, supra*: "When such a [untimely] petition for rehearing is granted and the issues of the original order are reexamined and an order is entered, either denying or allowing a change in the original order, the time for review . . . begins to run from that entry." 317 U.S. at 149. The mere denial of a motion to dismiss the petition for rehearing as out of time, or granting of a motion permitting the filing of the petition for rehearing, is not sufficient to suspend the running of the time for review. 317 U.S. at 151.

In this case there clearly was no such re-examination of the basis of the original order. In order to determine whether or not there was such a re-examination, one must inspect the order denying the rehearing. "It [the order] would show either a refusal to allow the petition for rehearing or a refusal to modify the original order." 317 U.S. at 150-151. In this case, the order denying rehearing (Pet. App. 29) shows simply a refusal to allow the petition for rehearing.

While the terms of the order itself are controlling, under *Pfister*, it is noteworthy that the circumstances support this interpretation of the order denying rehearing. Rule 40(a), FRAP, provides in part: "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without re-argument or may restore it to the calendar for re-argument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case." Respondent was never requested, or even given an opportunity, to file an answer to the petition for rehearing. It is inconceivable that the Eighth Circuit would have in fact re-examined the basis of the original order, and made a new final determination of the merits of the case, without permitting counsel for respondent to file some form of answer to the petition for rehearing.

Further, it should be recalled that Rule 40(a), FRAP, requires that the petition for rehearing "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended . . ." Yet the petition for rehearing merely re-argued the merits, without stating any point of law or fact which the court of appeals allegedly overlooked or misapprehended. It is small wonder that the petition was simply denied, without more.

These circumstances reaffirm the conclusion that the court of appeals did no more than "examine . . . the petition for

rehearing and determine . . . that [petitioner] had had full opportunity to present [its arguments]" and therefore denied the petition. *Pfister, supra*, 317 U.S. at 151.

It follows that the court below "did not re-examine the basis of . . . the original order . . . and that time for filing the petition . . . [for certiorari] was not extended." 317 U.S. at 151. Compare the analysis of this problem in *Papanikolaou v. Atlantic Freighters, Ltd.*, 232 F. 2d 663, 666-668 (4th Cir., 1956), cert. denied, 352 U.S. 828.

In this respect the case is quite different from *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 138 (1937), in which case, on supplemental petition for rehearing, the merits were fully re-examined, and the court made findings and announced conclusions of law with respect thereto. By the same token, the case is quite different from *Bowman v. Loperena*, 311 U.S. 262, 266 (1940), in which the court entertained an untimely petition for rehearing of the denial of a petition for review of a bankruptcy order, conducted a hearing thereon, and issued an order reciting that it had conducted a hearing on the merits, and denying the basic petition for review of the bankruptcy order. This fact also distinguishes *FPC v. Idaho Power Co.*, 344 U.S. 17, 20-21, and note 1 (1952), in which the court of appeals re-examined the merits and entered a new and different judgment; this Court noted that, "If the court did no more by the second judgment than to restate what it had decided by the first one, *Department of Banking v. Pink*, 317 U.S. 264, would apply and the 90 days would start to run from the first judgment."

Nor can it be seriously suggested that the order of Mr. Justice Blackmun on June 6, purportedly extending the time to file a petition for certiorari to July 13, resuscitated this litigation. The order was entered more than two months after the time for filing a petition for certiorari had expired, and this

Court at that time lacked jurisdiction to entertain a petition for certiorari, much less to extend the time for filing one. *Cf. Conboy v. First National Bank of Jersey City*, 203 U.S. 141, 145 (1906).

QUESTION PRESENTED

The question purportedly presented by the petition for certiorari (p. 2) is not presented by this record, as will be shown below.

STATEMENT

The statement in the petition (pp. 3-8) does not adequately present the facts. They will be restated below.

A. Proceedings Below

Although this case came to the court of appeals on the employer's petition to review an order of the National Labor Relations Board, directing the employer to bargain collectively with the union, the issue presented arises out of the underlying election proceeding.

1. The Election Proceeding

Alpers' Jobbing Company (respondent here) is a shoe warehousing company in St. Louis, Missouri, with approximately 15 employees as of April, 1975 (R. 46; Pet. App. 45). On February 25, 1975, Teamsters Local Union No. 688 filed a petition for election at Alpers' (R. 1). A consent election was conducted on April 4, 1975, at which three voters were challenged by the union (R. 8). The tally on the election day showed six votes for the union, three votes against the union, one void ballot, and three challenged ballots (R. 8).

Affidavits of the three challenged employees were taken to determine their eligibility to vote (R. 2-7). They were subsequently determined eligible (R. 12), and their ballots were opened. Two of their ballots were counted against the union, and one for the union, resulting in a final tally of seven votes for the union and five against (R. 14).

The employer filed timely objections to the conduct of the election, pointing out the facts set forth below, upon the grounds indicated below (R. 15). Simultaneously, the employer filed affidavits of Irvin Alper, the president of the company, and Sharon Sacus, an employee, and granddaughter of one of the three challenged voters (R. 19, 26). The Board's Field Examiner thereupon took affidavits of the three challenged employees (R. 29-38). The three employees in question, being dissatisfied with the refusal of the Board's Field Examiner to include in their statements the facts which they wanted to present, and especially the facts that they wanted to vote against the union, and did the best that they could to vote against the union, and felt strongly that they wanted their votes counted against the union, submitted further affidavits (R. 39-44).

The Regional Director recommended that the employer's objections to the conduct of the election be overruled (R. 45; Pet. App. 43). The employer filed timely exceptions to the Regional Director's Report and Recommendations presenting the arguments indicated below, and pointing out that the Regional Director's Report did not even purport to apply the applicable rule of law (R. 52-61).

The Board thereupon, without conducting a hearing, on August 4, 1975, upheld the Regional Director's Report, without discussion of the issues, and certified the union as the collective bargaining representative (R. 62-64; Pet. App. 52-54).

2. **The Unfair Labor Practice Proceeding.**

On or about August 27, 1975, the employer told the union that the employer believed that the certification was invalid, and that the employer was very much dissatisfied with that certification, and with the failure of the National Labor Relations Board even to hold a hearing, or to acknowledge the employer's brief before the Board or the cases cited in the brief, or to give any weight to the desires of the employees, and that the employer would like the union to cooperate in accelerating an appropriate proceeding to obtain judicial review of the certifications. Following further communications between the union and the employer, the employer respectfully declined to meet with the union, and to recognize the union as the exclusive bargaining agent for the employees, in order to establish a procedure by which to obtain judicial review of the certification (R. 72).

On September 19, 1975, the Union filed a charge under § 8 (a) (5) of the National Labor Relations Act, 29 U.S.C., § 151 *et seq.*, charging that the employer had refused to bargain in good faith (R. 65). A complaint was promptly issued on September 29, 1975, alleging a refusal to bargain in violation of § 8(a)(5)(R. 66-69).

The employer filed an answer admitting the above details, and alleging the matters set forth below, and alleging that the true and correct result of the election was "no union" (R. 73-74). Specifically incorporated in the answer by paragraph 14 thereof (R. 73) were supplemental affidavits of the three challenged employees (R. 75-80).

Subsequently, at the invitation of the Board agent, in order to clarify erroneous allegations of the complaint, and simplify the papers for review, the employer filed an amended answer, reaffirming and incorporating all of the matters set forth in its original answer, including the attached affidavits (R. 81).

Without any hearing, or any further filing of any papers, the General Counsel filed a motion for summary judgment (R. 83). The Board ordered the proceeding transferred to the Board, and gave the employer notice to show cause why summary judgment should not be granted (R. 85). The employer filed a response to that order, pointing out that the employer had never been given a hearing respecting its objections to the conduct of the election; that the employer was entitled to a hearing; that the motion for summary judgment did not even attach the affidavits which were filed with the Regional Director prior to the certification, in conjunction with the objections; that denial of a hearing deprives the employer, and the employees, of due process of law, in violation of the Fifth Amendment; that the certification was invalid and incorrect for the reasons indicated below, and resulted from an unconstitutional procedure which deprived the employer and the employees of a hearing, and various other objections (R. 86-87).

On February 9, 1976, the Board issued its Decision and Order, rejecting the employer's defenses without considering them, on the ground that the employer is not entitled to relitigate in an 8(a)(5) proceeding issues which were litigated in a prior representation proceeding (R. 91; Pet. App. 31, 34).

On February 19, 1976, the employer filed a petition for review in the court below (R. 99). After oral argument, the court below granted the petition for review and denied enforcement, on the ground that the totality of circumstances demonstrated that "the election procedure did not assure the fair and accurate expression" of the true desires of the employees (Pet. App. 17, 22, 25). The chronology of the subsequent untimely petition for rehearing is set forth at pages 2-3, *supra*.

B. Circumstances of the Election

Among the 15 employees of its shoe warehousing business, Alpers has maintained several elderly men, who work substantially less than a 40-hour week (R. 9-10). Three of these elderly men are the subject of this controversy.

Sam Melinas is 69 years old, and works approximately 29 hours per week (R. 10). He is totally unable to read or write English (R. 20, 44, 79), and has only a limited understanding of spoken English (R. 20). Indeed, when he first signed an affidavit for the NLRB Field Examiner, it was necessary to read the affidavit to him, and his effort to make his signature (R. 3) is totally illegible in English, although it presumably resembles his name in Yiddish, of which he reads only a little, if any (R. 20). His signatures on other affidavits are equally illegible (R. 34, 44, 80). His comprehension of anything outside his daily experience, communicated even in Yiddish, is extremely limited (R. 20). Before the election Mr. Alper explained to him that "Yes" has three letters and "No" has two letters, but it is questionable whether he understood (R. 20). He is highly nervous and excitable, and has never voted for or against anything, or any person, in his life (R. 20, 80). He was told before the election that he could vote against the union by placing a mark on the right-hand side of the ballot, and he did that to the best of his ability (R. 44, 79). If the ballot was handed to him upside down, he would still put the X on the right-hand side of the ballot, because he wanted to vote against the union (R. 79).

Louis Sacus is 63 years old, and works approximately 29 hours per week (R. 10). He cannot read or write very well, and cannot see very well without his glasses, which he forgot and left at home on the day of the election (R. 21, 27, 75). His understanding is extremely limited. His granddaughter, Sharon Sacus, explained to him approximately three times in the week before the election what "yes" and "no" meant on the ballot, and which

side of the ballot was "yes" and which was "no," but she didn't know whether he really understood it or not after she had explained it to him (R. 32). He is virtually illiterate (R. 21). Notwithstanding repeated explanations of the form of the ballot, on the day before the election Louis Sacus was still so confused that he thought that "no" was on the left side of the ballot (R. 21). He has virtually no understanding of the election process, and virtually no ability to cope with written documents (R. 22). Mr. Alper also explained to him two or three times before the election that "yes" has three letters, and "no" has two letters (R. 35), but it must be questioned whether that explanation was really effective. He was very confused at the time of the election, and attempted to put an X on the right side of the ballot, but if the ballot was handed to him upside down, he would still put the X on the right side (R. 75-76).

Marshall Dubinsky is 66 years old, and works approximately 24 hours per week (R. 9-10). He is not so illiterate as Sam Melinas and Louis Sacus, but he has a very limited command of the English language, and very little understanding of the election process (R. 22). He is a very excitable person, and is easily upset (R. 22, 32, 40, 77-78).

All three of these men believed that they had nothing to gain by having a union in the shop, and were firmly opposed to the union from the beginning of the organizational campaign (R. 26-27, 39, 41, 43, 75-76, 77-78, 79-80). They are all on Social Security, Medicare and Medicaid, and are confident they will be replaced by younger workers if the union comes into the shop (R. 76, 78, 79). Indeed, Marshall Dubinsky, a man of extremely limited understanding (R. 22, 29), but able to write a little, felt so strongly that he refused to sign his affidavit of June 4, 1975 until he was permitted to write in, in his own handwriting, "I don't want no union" (R. 40). All three were determined to vote against the union as best they could, and they were distressed when the Board's Field Examiner declined to

include these facts in the statements he took from them on June 3 (R. 40, 42, 44, 76, 78, 80).

Prior to, and at the time of, the election, the Board did nothing to enable these three men to express their free choice accurately (R. 30). No ballot was provided in Yiddish. No effort was made to assist them in voting, so that the ballot would in fact reflect their desires.

The election was held, in part, in a relatively open area towards the rear of the shop at 1419 Martin Luther King Drive in St. Louis (R. 27). When Marshall Dubinsky went to vote, the union observer challenged him in a very loud voice, which could be heard throughout the shop. Dubinsky was very excited, nervous, and upset by the union observer's loud and belligerent conduct (R. 28, 37, 40, 78). He did not understand what a "challenge" meant in the context of a union election, and thought that the union observer was challenging him to fight (R. 37, 77). Dukinsky turned and put up his fists, and said "wait till I come out" (R. 77, 32, 37). When order was restored, Dubinsky proceeded to attempt to vote, but he was very confused and upset (R. 78).

Sam Melinas heard this altercation, didn't understand it (R. 34, 38), and was upset and frightened by it (R. 23, 44). He went in to vote right after Dubinsky (R. 34). He, too, was challenged by the union observer, and there was a lot of talk, and he did not understand what it was all about, and didn't know what a challenge meant (R. 33). With all the confusion, even if he could read or write English, he would have been mixed up, because he is a very nervous person and has never voted in his life (R. 80, 44).

Louis Sacus was very nervous, confused, and upset at the time he voted (R. 42, 75). Not being able to read well at best, he forgot his glasses on election day (R. 21, 27, 75). The union

observer also challenged him, but Sacus didn't understand what the union observer was talking about (R. 30).

All three men did the best that they could, with their limited abilities and understanding, to vote against the union (R. 40, 77-78; 42, 75-76; 44, 79-80). But all three were bewildered by the challenge and the manner in which it was made, and did not understand it (R. 23). When the three challenged ballots were opened, one ballot had an X within the square under the "yes" (R. 47).

REASONS FOR DENYING THE WRIT

There are at least four good reasons for denying the writ.

1. **This Court Lacks Jurisdiction.**

This point is explained under the heading "Jurisdiction" at pages 1-7, *supra*. If the writ should nonetheless be granted, it will have to be dismissed eventually, as improvidently granted. This small employer should not be put to the further expense of briefing and arguing the merits; the writ should simply be denied.

2. **The "Question Presented" by the Petition Is Not Presented by This Record.**

"[T]he duty of the Board [is] to establish the 'procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.' " *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973). See also *N.L.R.B. v. Tower Co.*, 329 U.S. 324, 330 (1946).

This Court went on in *Savair* to acknowledge that, of course, the Board has a wide discretion in this area. But the Court emphasized that special precautions are required where "two opposed groups are in contention: one composed of those who want a union and the other, of those who prefer not to have one." 414 U.S. at 277. "Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it." *Id.* at 278.

As this Court stated in *N.L.R.B. v. Tower Co.*, 329 U.S. 324, 331: "[T]he board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded *accurately*, efficiently and speedily [emphasis added]." "An election can serve its true purpose only if the surrounding condi-

tions enable employees to register a free and untrammeled choice for or against a bargaining representative . . . it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 N.L.R.B. 124, 126-127 (1948). See also *N.L.R.B. v. Payless Cashway Lumber Store*, 508 F.2d 24 (8th Cir. 1974).

In determining whether this standard has been met, as the court below recognized (Pet. App. 17, 22), it is necessary to consider the cumulative effect of all of the circumstances bearing upon the election, or the "totality of the circumstances." *LaCrescent Constant Care Center, Inc. v. N.L.R.B.*, 510 F. 2d 1319, 1324 (8th Cir. 1975); *N.L.R.B. v. Decoto Aircraft, Inc.*, 512 F. 2d 758 (9th Cir. 1975), cert. denied, 423 U.S. 836, *N.L.R.B. v. Janler Plastic Mold Corp.*, 82 LRRM 2174, 2176-77 (7th Cir. 1972).

Thus, the question presented by the employer's objections to the conduct of the election (R. 15-18), and the only question which could be presented or decided below, was whether the *totality of circumstances*, as shown by the record, indicates that this rigid standard has not been met. The "totality of circumstances" includes far more than simply "that a voter may have made a mistake in marking his ballot," as the question is stated by petitioner (p. 2). That totality of circumstances includes:

1. The extremely limited capacity (borderline at best) of the three elderly men in question;

2. The loud, belligerent conduct of the union observer, which upset and confused the men, pushing one of them over the borderline;

3. The fact that the Board gave no assistance to the men in attempting to register their preference;

4. The undisputed fact that the men were strongly opposed to the union, did everything they physically could to vote against the union, and are outraged to find that one of their ballots is being counted for the union; and

5. The fortuitous segregation of their three ballots, so that it can easily be demonstrated that one of them is an error.

All of these circumstances are shown by this record, and all are a part of the "totality of circumstances."

From the beginning, the Board has persistently refused to recognize what the issue is. In his Report on Objections and Recommendations (Pet. App. 43-51) the Regional Director insisted upon separating the limited capacity of the three men from the loud, belligerent conduct of the union observer, treating each point separately, and concluding that neither point alone justified setting aside the results. The employer, in its Exceptions to that Report (R. 52), bitterly protested this separation of the circumstances into two separate, independent pigeonholes, and this refusal to consider the totality of circumstances (R. 55). Nevertheless, the Board affirmed that Report without written opinion, refusing to acknowledge the existence of the principal cases cited by the employer in its Exceptions, and refusing to apply, or even to acknowledge the existence of, the applicable rule of law (R. 63; Pet. App. 52). This alone would require that enforcement be denied. *E.g., Teamsters Local Union 679, etc. v. N.L.R.B.*, 532 F. 2d 1385 (D.C. Cir. 1976).

In the unfair labor practice proceeding which followed, the Board again refused to consider the applicable rule of law in any way, simply ruling that the issues litigated in the representation proceeding may not be relitigated in the unfair labor practice proceeding (R. 91; Pet. App. 31, 34). It was not until the case reached the court of appeals that the employer was able

to persuade any governmental official or tribunal to apply to this case the applicable rule of law. That court expressly recognized the applicable rule (Pet. App. 22), and pointed out the various circumstances which constituted the "totality of circumstances," including the limited capacity of the men (Pet. App. 18, 23), the strong opposition of the men to the union (Pet. App. 18-19, 22-23), the loud, belligerent and upsetting conduct of the union representative at the election, in the presence of at least two of the men (Pet. App. 19, 23, 25) and the certainty that one of them made a mistake (Pet. App. 20, 22-24, 25).

In light of the history of the litigation, the Board's persistence in willfully misstating the issue is sheer flummery.

3. **Petitioner Is Asking This Court to Review the Evidence and Find the Facts, on Review of a Summary Judgment.**

From a reading of the argument portion of the petition, one would never guess that this case was decided by the Board on summary judgment. Petitioner patronizingly observes that the court below "chose to credit the post-election affidavits" (p. 13); petitioner quibbles about "the most that legitimately can be inferred from the Union's challenges" (p. 13); petitioner apparently draws some (mysterious) inference from the fact that the ruckus at the polling place lasted "about two minutes" (p. 15); petitioner complains that some statements in some affidavits allegedly "are contradicted" by other statements and other affidavits, apparently asking this Court to conclude that one is correct and the other incorrect (p. 14); and petitioner complains that statements made in some affidavits did not appear in earlier affidavits from the same persons, apparently suggesting that the later affidavits should be discredited (p. 14, n. 7).

(The latter point is explained by the affidavits themselves. The three men in question politely explained that the Board

agent who took the earlier affidavit "did not include the foregoing facts in that statement" (R. 40, 42, 44). They could have said more precisely, and would say if they could ever get a hearing, that the Board agent refused to include those facts, even though he was requested to do so.)

The place to resolve disputed facts, and to explore the possible inferences to be drawn therefrom, is at a full and fair hearing, including oral testimony and cross-examination. This is what the employer, and the three men in question, have been pleading for, for more than two years. The Board has persistently refused to conduct a hearing.

When the Board denies a hearing, of course the facts presented in the respondent's affidavits must be taken as true on appellate review. Due process requires no less. *Morgan v. United States*, 304 U.S. 1, 14-15 (1938); *N.L.R.B. v. Staiman Bros.*, 466 F. 2d 564, 567 (3d Cir. 1972); *N.L.R.B. v. Bata Shoe Co.*, 377 F. 2d 821 (4th Cir. 1967), cert. denied, 389 U.S. 917. The petition for certiorari makes it clear that the Board in fact chose to discredit the affidavits; that alone is sufficient to require that enforcement of the bargaining order be denied.[3]

This Court need not spend its time attempting to unravel allegedly disputed factual questions and inferences, when the Board has repeatedly refused to hold a hearing to establish the facts. Nor need this Court grant certiorari in order to teach the Board what a summary judgment is; the courts of appeals are steadily pounding that lesson home.[4] As the courts of ap-

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[3] If it be suggested that the court below might have remanded the matter to the Board with instructions to hold a hearing, as was suggested by the court below in oral argument, it should be noted that the Board's counsel flatly refused to accept such a remand, stating in substance that the Board would not hold a hearing on remand.

[4] A sampling (not inclusive) of recent cases in which the courts of appeals have set aside the Board's persistent abuse of the summary

peals continue their vigilant oversight, it may be expected that the Board will eventually conclude that the summary judgment procedure may not lawfully be used as a bludgeon with which to subdue those employees who choose not to support the union.

4. The Case Depends on Its Unique Facts, and Presents No Important Question of Federal Law Which Needs to Be Settled by This Court.

As the court below pointed out, this case presents "unique circumstances surrounding the election" (Pet. App. 18), or "unique facts" (Pet. App. 23). Accordingly, the ruling below "is a narrow one" (Pet. App. 25). These are understatements; in fact, this case is a freak.

When one considers the totality of circumstances (as the Board has persistently refused to do), they are freakish. It is only the circumstance that the union challenged these three men that led to the segregation of those three ballots from all the others; it was that fact which demonstrated that one of these three men had, in fact, utterly failed to record his preference. None of the lawyers who have worked on this case in the last two years has found any similar case.

Putting aside that unique fact, the remaining facts are somewhat analogous to those in two reported cases, where the circumstances have merely *suggested* that the voters were not able to cope with the written ballot. In both cases, the election was set aside. In *Fibre Leather Mfg. Corp.*, 167 N.L.R.B. 393 (1967), the Board had even provided bi-lingual observers, but had failed to notify the foreign language employees of the availability of assistance from the bi-lingual observers, and the employees failed to request assistance. The Board held:

> "[W]e are not satisfied that the conditions under which the election was conducted were such as to assure the effective and informed expression by all employees of their true desire." 167 N.L.R.B. at 393.

In *Marriott In-Flite Services Division of Marriott Corp. v. N.L.R.B.*, 417 F. 2d 563 (5th Cir. 1969), cert. denied, 397 U.S. 920 (1970), the Board failed to provide ballots in Spanish for an election in which approximately one-third of the eligible employees spoke only Spanish. Even though the Board had provided bi-lingual election notices, and Spanish-speaking officials at the polls, and even though the union won the balloting, 299 to 203, the Fifth Circuit set aside the election. "An election in which one-third of the electorate has no access to ballots in language that it can understand necessarily falls below the minimum laboratory standards of fairness . . . what comprises fairness to the minority in the one case [political elections] does not necessarily define fairness to the minority in the other [NLRB elections] . . . [The Board] must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." 417 F. 2d at 567, 568.

If the court below had ruled against the employer, its rationale would inevitably have conflicted with the *Fibre Leather* and *Marriott* decisions. But that is not the case.

Petitioner states that the Board conducted 8,899 elections in a recent fiscal year (p. 15). In the last 44 years, one may suppose

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judgment procedure includes *Henderson Trumbull Supply Corp. v. N.L.R.B.*, 501 F. 2d 1224, 1230 (2d Cir., 1974); *N.L.R.B. v. Staiman Bros.*, 466 F. 2d 564, 567 (3d Cir., 1972); *N.L.R.B. v. Smith Industries, Inc.*, 403 F. 2d 889, 893 (5th Cir. 1968); *N.L.R.B. v. Mr. Fine, Inc.*, 516 F. 2d 60, 63 (5th Cir. 1975); *Argus Optics v. N.L.R.B.*, 515 F. 2d 939 (6th Cir. 1975); *N.L.R.B. v. Janler Plastic Mold Corp.*, 82 LRRM 2174, 2176-77 (7th Cir. 1972); *N.L.R.B. v. Southern Paper Box Co.*, 473 F. 2d 208, 211 (8th Cir. 1973); *Alson Mfg. Aerospace Div. of Alson Industries, Inc. v. N.L.R.B.*, 523 F. 2d 470, 472 (9th Cir. 1975); *Excelsior Laundry v. N.L.R.B.*, 409 F. 2d 70, 72 (10th Cir. 1968).

that the Board must have conducted hundreds of thousands of elections. If the decision below really constituted "a serious departure from established principles" (Pet. p. 8), out of all those elections surely petitioner could have found at least one circuit court decision in conflict with the decision below. Significantly, petitioner has found none. That is because the decision below correctly applies the established rules of law.

Petitioner contends that "the Board has adopted the general principle that clearly-marked [sic] ballots may not be impeached by post-election statements or other evidence indicating that the voter made a mistake or acted under a misunderstanding" (p. 9). If this means that the probability, or certainty, that the ballots failed to reflect the true intent of the voters accurately is not relevant on post-election objections, then this contention is repudiated by the *Fibre Leather* and *Marriott* decisions, *supra*, and is not supported by the cases cited by petitioner at page 9, note 3.[5] Clearly an election

[5] In *McFarling Bros. Mid-State Poultry & Egg Co.*, 123 N.L.R B. 1384 (1959), several employees presented affidavits generally to the effect that they had not taken the election seriously, and that they would vote differently if they had it to do over again; the Board simply held that the affidavits were insufficient "to rebut the presumption that all voters expressed their true choice by their clearly marked ballots" (123 N.L.R.B. at 1385); the implication is that more persuasive evidence would have rebutted the presumption. In *V. LaRosa & Sons, Inc.*, 121 N.L.R.B. 671 (1958), the Board simply found that an allegedly confusing designation of the union on the ballot was not really confusing; there was no contention that a disturbance in the polling place had so upset the voters that they were unable to vote their true preference. In *Johnson City Foundry & Machine Works, Inc.*, 71 N.L.R.B. 825 (1946), the Board again emphasized that the employer in that case did not even contend that any conduct on the part of the Board's agents or the union's agents caused any mismarking of the ballots, stating that "no circumstances have been presented here to warrant departure from our normal policy" (71 N.L.R.B. at 828). In *T & G Manufacturing, Inc.*, 173 N.L.R.B. 1503, 1504 (1969), the union and the employer by stipulation attempted to withdraw a ballot which had been put into the ballot box, thereby depriving the employee of his vote, and in addition thereby imposing on the Board the impossible task of attempting

should be set aside if the totality of the circumstances establishes that the tally *probably* does not reflect the true intent of the voters, as is shown by *Fibre Leather* and *Marriott;* that rule alone would be sufficient to dispose of this case. This record adds additional proof that the tally *certainly* does not reflect the true intent of the voters; surely that additional proof cannot cause the election tally to be validated.

Apparently the Board is arguing here, as it did below, that statements regarding how an employee voted or intended to vote may not ever, under any circumstances, be admitted as evidence in support of objections to the conduct of election. The cases cited in support of that proposition are adequately distinguished by the court below (Pet. App. 24-25). In fact, no such blanket rule exists. For example, in *Necco Sales Corp.*, 119 N.L.R.B. 155 (1957), the statements of the employees as to how they voted, and how they intended to vote, were accepted and considered; the election results were upheld, not because such evidence is inadmissible, but because "there is no indication that the voters were unduly rushed or handicapped in casting their ballots" (119 N.L.R.B. at 156). And in *N.L.R.B. v. Titche-Goettinger Co.*, 433 F. 2d 1045, 1048 (5th Cir. 1970), the Fifth Circuit denied enforcement of the Board's order to bargain, relying in part upon the affidavits of two voters declaring their intention to vote against the union.

In other cases the Board and the courts have lamented the absence of such evidence. For example, in *N.L.R.B. v. Griffith Oldsmobile, Inc.*, 455 F. 2d 867 (8th Cir. 1972), the court enforced the Board's order against the employer, em-

to determine which of the ballots in the box was the one cast by that employee; for once, the Board protected the employee and refused to let the union and the employer jointly dispose of his vote by stipulation. None of these cases establishes the proposition that an employee may not be heard to complain that his ballot is not being counted as he attempted to vote. (The *LaRosa* and *Johnson City* cases are being cited here for the first time in this litigation.)

phasizing the shortcomings of the employee affidavits on which the employer relied: "Nor did they state that they had voted for the union in the election" (455 F. 2d at 871). In *N.L.R.B. v. White Knight Mfg. Co.*, 474 F. 2d 1064, 1068 (5th Cir. 1973), the Board upheld the election tally, emphasizing the lack of evidence that any of the voters "were unable to vote their personal preferences in the election." In the *McFarling* case cited at page 22, n. 5, *supra*, the employee affidavits were substantially to the effect that they wished that they had voted differently; in upholding the election tally, the Board emphasized the lack of evidence "to rebut the presumption that all voters expressed their true choice by their clearly marked ballots." 123 N.L.R.B. at 1385. In *Palm Container Corp.*, 117 N.L.R.B. 434, 436 (1957), the Board overruled objections to the election based upon failure to explain the nature of the balloting to Spanish-speaking employees and illiterates, emphasizing again that "there is no evidence whatever of any employee who has claimed that his ballot, as marked, did not express his true intent."

Of course the employer should not be permitted to coerce the employees to state that they had voted against the union. If any such coercion occurs, it may be assumed that the Board will vigilantly protect the employee. But here there was no coercion. There was not even any questioning by the employer. In this case the employee has come forward voluntarily, and is insisting that he be heard. When all of the surrounding circumstances demonstrate that he has made his anti-union views known to all concerned from the very beginning, and his ballot has been so segregated that it is clear that his ballot does not reflect his true intent, and the disturbance at the polls pushed him across the boundary of incompetence, there is no rule of law that prevents him from testifying.

CONCLUSION

The decision below is clearly correct. It rests upon a unique set of facts, as petitioner implicitly acknowledges by arguing that the affidavits must be discredited. On this unique set of facts, the decision resolves no important question of federal law with any significance for the future.

In any event, this Court lacks jurisdiction, and the "question presented" in the petition for certiorari is not in fact presented on this record.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX 1

United States Court of Appeals
For the Eighth Circuit
St. Louis, Mo. 63101

February 2, 1977

Robert C. Tucker, Clerk

Mr. Elliott Moore
& Ms. Carol A. DeDeo
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: 76-1131. Alpers' Jobbing Co. v. NLRB

Dear Counsel:

I have today received, from the clerk of the United States Court of Appeals for the Sixth Circuit, petition for rehearing, presumably in this case. The petition is entitled "In the Sixth Circuit" and was obviously sent to the clerk of the Sixth Circuit in error.

An order was entered in this case on January 14 providing that the Board might have to and including January 27 in which to file petition for rehearing. The petition bears a "received" stamp showing that it was received by the clerk of the Sixth Circuit on January 31.

Under the circumstances I decline to file the untimely petition for rehearing.

You may, if you like, file some sort of appropriate motion with us seeking to have the petition for rehearing filed out of time.

Very truly yours,

Robert C. Tucker
Clerk

a

copy

Mr. Lewis C. Green
Mr. Clyde C. Craig
Mr. Joseph H. Solien

APPENDIX 2

United States Court of Appeals
For the Eighth Circuit

76-1131 September Term, 1976

Alpers' Jobbing Company, Inc., Petitioner, vs. National Labor Relations Board, Respondent.	Petition for Review of Order of the National Labor Relations Board

For cause it is now here ordered that the Clerk of this Court is directed to file the untimely petition for rehearing tendered by counsel for respondent in this cause.

February 18, 1977

Supreme Court, U. S.
FILED
SEP 22 1977
MICHAEL RODAK, JR., CLERK

No. 77-70

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ALPERS' JOBBING COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-70

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ALPERS' JOBBING COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent contends (Br. in Opp. 1–7) that this Court lacks jurisdiction to consider the Board's petition for certiorari because the Board's petition for rehearing was untimely and thus did not toll the judgment below, which was entered more than 90 days before the petition for certiorari was filed (28 U.S.C. 2101(c)).[1] This contention fails to give effect to Rule 26(b) of the Federal Rules of Appellate Procedure,

[1] A timely filed petition for rehearing tolls the lower court's judgment until the court disposes of the petition for rehearing. *United States* v. *Healy*, 376 U.S. 75, 78–79; *Department of Banking* v. *Pink*, 317 U.S. 264, 266.

and misconceives the principles governing the filing of petitions of rehearing out of time.

1. Rule 26(b), Fed.R.App.P., provides that "[t]he court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or *may permit an act to be done after the expiration of such time*" (emphasis added).[2] In the present case, the Board filed its petition for rehearing with the court of appeals well within the 90-day period for seeking certiorari (counting from the entry of the judgment), but not until several days after the authorized extension of the 14-day period prescribed in Rule 40(a), Fed.R.App.P., had expired.[3] The Board therefore moved the court below for leave to file the petition for rehearing out of time (see Motion, *infra,* pp. 10–11). The court, finding that the Board had satisfied the "good cause" requirement of Rule 26(b), directed that the "untimely petition" be filed (Br. in Opp. A–3).

The time for filing a petition for certiorari was therefore tolled until the order denying rehearing was

[2] Rule 26(b) lists specific instances in which the court is precluded from enlarging the time for performance; the list does not include petitions for rehearing.

[3] The judgment was entered on December 30, 1976. On January 14, 1977, the court below extended the time for filing a petition for rehearing to January 27, 1977 (a copy of the court's order is set forth, *infra*, p. 9). The petition for rehearing was not received by the court below until February 2, 1977. A printer's error on the cover of the petition had caused it to be mailed to the wrong circuit. See Motion for Leave to File the Board's Petition for Rehearing and Suggestion for Rehearing In Banc Out of Time, *infra*, pp. 10–11.

entered.[4] The "filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena,* 311 U.S. 262, 266. Here the court, after expressly directing that the petition be accepted for filing, should be deemed to have entertained and considered the petition on its merits no less than if it had been filed within the prescribed 14-day period or within a timely extension of that period (which is also subject to the "good cause" requirement of Rule 26(b)). That the court did so entertain and consider the petition is confirmed by the fact that the court gave the petition, which sought a reexamination of the basis for the panel decision, *en banc* consideration, ultimately denying it by an evenly divided vote.[5]

Tolling the time in which to petition for certiorari, after a court of appeals has determined to consider an untimely petition for rehearing filed within the original certiorari period, is a policy that serves judi-

[4] The petition is set forth, *infra*, pp. 12–18.

[5] The court's order was entered on March 15, 1977 (Pet. App. 29). On June 6, 1977, Mr. Justice Blackmun extended the time for filing a petition for certiorari to July 13, 1977, and the petition was filed on July 12, 1977.

cial economy without impairing other substantial rights. If there were doubt whether the lower court's acceptance of an untimely petition for rehearing would extend the time for filing a petition for certiorari, parties out of time under Rule 40(a), Fed. R. App. P., would be forced to file protective petitions for certiorari whenever the lower court had not finally ruled on the petition for rehearing before the 90-day period from the entry of judgment had expired. This practice would not only inhibit forthright reconsideration by the court of appeals but would encumber this Court's already crowded docket with documents that might ultimately have been avoided. As this Court has stated in a related context (*United States* v. *Healy,* 376 U.S. 75, 80):

> It would be senseless for this Court to pass on an issue while a motion for rehearing is pending below, and no significant saving of time would be achieved by altering the ordinary rule to the extent of compelling a notice of appeal to be filed while the petition for rehearing is under consideration.

2. The Company's heavy reliance (Br. in Opp. 4–6) on *Pfister* v. *Northern Illinois Finance Corp.,* 317 U.S. 144, is misplaced. In that case the Court was faced with an attempt to rejuvenate an extinguished right of appeal by means of a petition for rehearing. The Court ruled that, where the time for appeal had previously expired, the denial of a subsequently filed petition for rehearing would not revive the right of appeal absent a showing on the face of the denial that the

lower court had reexamined the basis of the original order. 317 U.S. at 149–150. The distinction between that situation and the one here was explained by Judge Magruder in *Denholm & McKay Co.* v. *Commissioner of Internal Revenue,* 132 F. 2d 243, 247–248 (C.A. 1):

> A petition for rehearing may be filed out of time, in two senses; (1) it may be filed after the period prescribed by rule of court within which such petitions may be filed, but before the statutory period for appeal has expired, and (2) it may be filed after the statutory period for taking an appeal has elapsed.
>
> If untimely in the first sense, the court may nevertheless grant special leave for the filing of the petition for rehearing, which would indicate that the grounds urged in such petition will be considered on their merits. This is "entertainment" of the untimely petition; and the time for taking an appeal will not begin to run until the petition is disposed of. See *United States* v. *Seminole Nation,* 1937, 299 U.S. 417, 57 S.Ct. 283, 81 L.Ed. 316; *Bowman* v. *Loperena,* 311 U.S. 262, 266, 61 S.Ct. 201, 85 L.Ed. 177. * * *
>
> If a petition for rehearing is untimely in the second sense, that is, if it is filed after the statutory period allowed for taking an appeal has elapsed, special considerations apply, as the Supreme Court pointed out in its recent decision in *Pfister* v. *Northern Illinois Finance Corp.,* 63 S.Ct. 133, 87 L.Ed.—, November 16, 1942. See also *Mintz* v. *Lester,* 10 Cir., 1938, 95 F. 2d 590. * * *

The distinction identified by Judge Magruder rests on substantial grounds. Where the time for appeal has expired, it would defeat the strong policy of finality and repose to permit petitions for rehearing to be entertained, even for good cause, unless the lower court is prepared to reopen the judgment, *i.e.*, to reconsider the very foundation of its original judgment. Cf. *Greater Boston Television Corp.* v. *Federal Communications Commission,* 463 F. 2d 268, 277–280 (C.A.D.C.); *Hines* v. *Royal Indemnity Co.,* 253 F. 2d 111, 114 (C.A. 6) (a mandate once issued will not be recalled except in exceptional circumstances). See also *Isenberg* v. *Sherman,* 214 Cal. 722, 7 P.2d 1006 (Sup. Ct.), petition for certiorari denied, 286 U.S. 547 (state court lacked power to recall remittitur absent fraud or deception). On the other hand, where an untimely petition for rehearing is filed before the time for appeal has expired, the policy of finality and repose is not disturbed, and the lower court need only find good cause to entertain the petition.

The situation here falls in the latter category: the petition for rehearing was "filed after the period prescribed by rule of court within which such petitions may be filed, but before the statutory period for appeal has expired." *Denholm & McKay Co., supra.* Accordingly, when the court below, in exercising its authority under Rule 26(b), Fed.R.App.P., found "good cause" to permit the filing of the petition, that action was sufficient to toll the time for filing a petition for certiorari until the petition for rehearing had been

finally ruled on. The petition for certiorari was thus timely filed (n. 5, *supra*).

CONCLUSION

For these reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1977.

APPENDIX

United States Court of Appeals for the Eighth Circuit

No. 76-1131—September Term, 1976

ALPERS' JOBBING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of Order of the National Labor Relations Board

For cause shown it is now here ordered that respondent may have to and including January 27, 1977 in which to file petition for rehearing.

JANUARY 14, 1977.

United States Court of Appeals for the
Eighth Circuit

No. 76–1131

ALPER'S JOBBING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Motion for Leave to File the Board's Petition for Rehearing and Suggestion for Rehearing In Banc Out of Time

To the Honorable, the Judges of the United States Court of Appeals for the Eighth Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, respectfully moves this Court for leave to file the Board's petition for rehearing and suggestion for rehearing in banc herein out of time. In support of its motion, the Board shows as follows:

1. The Board's petition was due on January 27, 1977, pursuant to an extension of time granted by the Court on January 14, 1977.

2. A printing error necessitated a last minute change of the cover on the petition which was the wrong color. Counsel inadvertently failed to notice that the new cover designated the Sixth, rather than the Eighth Circuit, and the petitions were mailed to the Court indicated on the cover.

3. We have been informed by the Clerk of this Court that the petitions were received in the Sixth

Circuit on January 31, 1977, and have been forwarded to this Court. Allowing for three days mailing time, the Board's petition would have been due on January 31, 1977, since the third day fell on a Sunday, hence the Board's petition was timely received, albeit by the wrong Circuit.

4. The issues raised by the Board's petition are of great importance and this Court should not be denied the opportunity to consider those issues because of a printing error.

WHEREFORE, the Board respectfully requests that its motion for leave to file the Board's petition for rehearing and suggestion for rehearing in banc instanter out of time be granted.

Respectfully submitted,

ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

Dated at Washington, D.C., this 10th day of February, 1977.

United States Court of Appeals for the Eighth Circuit

No. 76-1131

ALPER'S JOBBING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Petition of the National Labor Relations Board for Rehearing and Suggestion for Rehearing In Banc

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, and Rule 7 of the Rules of this Circuit, the National Labor Relations Board respectfully petitions the Court for rehearing, and suggests rehearing in banc, to reconsider the majority decision entered by a panel of this Court on December 30, 1976,[1] setting aside the Board's finding that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union[2] certified as the exclusive representative of the Company's employees.

The sole issue in this case is the validity of the Union's certification by the Board after a secret

[1] The panel consisted of Circuit Judges Bright and Webster and Senior District Judge Smith, Eastern District of Michigan, sitting by designation.

[2] Teamsters, Local Union No. 688.

ballot election in which seven employees clearly marked their ballots in favor of the Union and six employees cast votes against representation. While recognizing the Board's broad discretion in establishing procedures and safeguards necessary to insure a fair election and the presumption that ballots cast pursuant to those procedures reflect the true desires of participating employees, the panel majority nevertheless refused to uphold the Board's certification because it found that one employee "may have erroneously marked his ballots in favor of the Union." (Slip op., p. 9). The panel majority based this finding on inferences drawn from statements made after the election and on alleged deficiencies in the balloting procedures which were not even raised by the Company until after the final tally of ballots. Despite the panel majority's attempt to limit its holding to the special circumstances of this case, the necessary effects of its decision are to contravene principles previously established by this Court and enunciated in numerous opinions of the Supreme Court and of other United States Circuit Courts and also to question the integrity of the Board's election process and endanger employees who participate in future Board elections.

1. The Board and courts, including this Court and the Supreme Court, have long recognized the dangers inherent in allowing voters to testify regarding their intent in voting and have "acknowledged [the] superiority of the election process" for determining whether a union has majority support. *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 602 (1969); *Semi-Steel Casting Co.* v. *N.L.R.B.*, 160 F. 2d 388, 392 (C.A. 8, 1947), cert. denied, 332 U.S. 758; *N.L.R.B.* v. *Clearfield Cheese Co.*, 322 F. 2d 89 (C.A. 3, 1963);

Harlan #4 Coal Company v. *N.L.R.B.*, 490 F. 2d 117, 122–123 (C.A. 6, 1974); *N.L.R.B.* v. *Southern Health Corp.*, 514 F. 2d 1121, 1126 (C.A. 7, 1975). This rule is based upon important policy considerations which are, in effect, undermined by the panel majority's decision in the instant case.

First, such testimony "is likely not to be satisfactory or useful." *N.L.R.B.* v. *Southern Health Corp., supra,* 574 F. 2d at 1126. Accordingly, the Supreme Court has rejected "any rule that requires a probe of an employee's subjective motivation as involving an endless and unreliable inquiry." *N.L.R.B.* v. *Gissel Packing Co., supra,* 395 U.S. at 608. Despite the recognized unreliability of testimony regarding a voter's intent, the panel majority held that the post-election affidavits in the instant case were buttressed by the fact that the three employees in question were challenged by the Union and by the fact that all three sought assistance from the employer prior to the election. However, as indicated by the Regional Director's Report on Challenged Ballots (A. 8–11), the Union's challenges were based on legitimate questions concerning the eligibility to vote in the election. Although it is unlikely that a Union would challenge employees who had indicated that they supported the Union, the most that can be inferred from the Union's challenges is that the employees' true position was uncertain. Nor is the reliability of the affidavits of Sacus, Melinas and Dubinsky enhanced by the fact that they approached the employer for assistance before the election and to protest the vote after the results became known. Such actions are no more reliable than the affidavits themselves, for an employee might have much to gain by impressing the employer or the union with his apparent support

before the election or by identifying his vote after the election. See, *International Union of Electrical Radio & Machine Workers* v. *N.L.R.B.*, 418 F. 2d 1191, 1202 (C.A. D.C., 1969).

The precarious relationship between the employees and both their employer and the union provides an additional and more important reason for rejecting the testimony of voters regarding their intention in voting. As this Court has stated: "[t]he reception of such evidence would also expose the employee to the hazard of union or employer coercion and thus imperil his freedom of choice of a bargaining representative." *Semi-Steel Casting Corp.* v. *N.L.R.B., supra,* 160 F.2d at 392. Cf. *N.L.R.B.* v. *A. J. Tower Co.,* 329 U.S. 324, 332 (1946). The absence of evidence of coercion in the instant case does not diminish the grave risk created by the decision of the panel majority for voters in future elections, particularly those voters whose ballots may become identifiable as a result of challenges.[3]

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[3] Similar considerations are reflected in the long and well established rule that testimonial evidence of jurors is inadmissible to impeach their verdict. As stated by the Supreme Court in *McDonald* v. *Pless*, 238 U.S. 264, 267–268 (1915):

". . . let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party * * *. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference."

See also, *Chicago Rock Island and Pacific Railroad Co.* v. *Speth*, 404 F. 2d 291, 295–296 (C.A. 8, 1968); *United States* v. *Schroeder*, 433 F. 2d 846, 851 (C.A. 8, 1970), cert. denied 400 U.S. 1024, 401 U.S. 943 (1971).

The effect of the panel majority's decision herein is to permit the Company to supplant a clearly and unambiguously marked secret ballot by means of affidavits obtained by the Company's attorney after the election. Cf. *Roberts Door & Window Company* v. *N.L.R.B.*, 540 F.2d 350, n. 3 (C.A. 8, 1976). Such a result is not only contrary to established precedent but also constitutes unwarranted interference with the Board's procedures by inviting sharp practices and the use of unreliable evidence. Moreover, the decision poses serious danger for participants in future Board elections for, as noted by Judge Webster in his dissenting opinion.

> The purpose of the secret ballot is to assure the voter his right to exercise his true choice in secret no matter what he may have felt it necessary to say previously. [footnote omitted].
>
> It is better that an election fairly conducted be allowed to stand regardless of claims of mistake than that employees whose votes were unsuccessfully challenged be made cat's paws in the election contest. (Slip op., at 11–12).

2. The foregoing considerations provide sufficient support for enforcement of the Board's order herein even assuming that one voter, in fact, made a mistake in marking his ballot. However, it should be noted that the precautions taken to guard against such mistakes were, at least, adequate. It is undisputed that the ballot and voting procedure was explained to the three employees in question numerous times prior to the election. In view of such repeated instruction it is doubtful that even illiterate employees would fail to recognize whether a ballot was up-

side down.[4] Moreover, the fact that the Company failed to request any further assistance for its employees is "compelling evidence that the proposed procedure was sufficient." *N.L.R.B.* v. *Lowell Corrugated Container's Corp.*, 431 F. 2d 1196, 1197 (C.A. 1, 1970); *Laars Engineers, Inc.*, 173 NLRB 514, 69 LRRM 1376 (1968). Nor was the Union observer's challenge of Marshall Dubinsky a disturbance of sufficient magnitude to warrant setting the election aside. Even if the challenge created some minor confusion, it could hardly be said to have "created an environment of tension or coercion such as to preclude employees from exercising a free choice." *N.L.R.B.* v. *Zelrich Co.*, 344 F. 2d 1011, 1015 (C.A. 5, 1965); *N.L.R.B.* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 32 (C.A. 5, 1969).

The panel majority failed to indicate how an election could have been more fairly conducted in this case. In fact, as noted by Judge Webster "[i]t is not clear that anything more could have been done." (Slip op., at 11, n. 1). To allow an election conducted under adequate safeguards to be set aside because of allegations of mistake would not only cast doubt upon any future election involving the employees of this Company but would similarly affect all future Board elec-

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[4] The panel majority's reliance on the fact that employee Louis Sacus, whose eyesight was poor, left his glasses at home on the day of the election would seem particularly misplaced. In an affidavit to a Board agent, Sacus stated that he could see that "yes" has 3 letters and "no" has 2 letters even without his glasses. Moreover, the Board agent explained the ballot to Sacus at the time of the election, showing him which box to mark in order to vote yes and which to mark to vote no (A. 35).

tions involving small numbers of employees, or employees who are elderly, excitable, or illiterate.

CONCLUSION

For these reasons, the Board respectfully requests that this petition for rehearing be granted, and that upon such rehearing the Court sustain the Board's finding that the Company's refusal to bargain violated Section 8(a)(5) of the Act.

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JANUARY, 1977.

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